No. 17-1201

In The Supreme Court of the United States

GARY THACKER and
VENIDA L. THACKER,
Petitioners,

v.

TENNESSEE VALLEY AUTHORITY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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Kenneth Bridges Cole, Jr.
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Dated: November 13, 2018

(Counsel Continued on Inside Cover)

Petition for Certiorari Filed February 26, 2018
Certiorari Granted September 27, 2018

No. 17-1201

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Petition for Certiorari Filed February 26, 2018
Certiorari Granted September 27, 2018

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General Docket

United States Court of Appeals for the Eleventh Circuit

Court of Appeals Docket #: 16-15105	**Docketed:** 07/21/2016
Nature of Suit: 3360 Other Personal Injury	**Termed:** 08/22/2017
Gary Thacker, et al v. TVE	
Appeal From: Northern District of Alabama	**Case Handler:** Lewis, Carol R., CC
Fee Status: Fee Paid	(404) 335-6179

Case Type Information:

1) Private Civil

2) Federal Question

3) –

Originating Court Information:

District: 1126-5 : 5:15-cv-01232-AKK

Civil Proceeding: Abdul K. Kallon, U.S. District Judge

Date Filed: 07/23/2015

Date NOA Filed: 07/21/2016

Prior Cases:

None

Current Cases:

None

GARY THACKER

Plaintiff - Appellant

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versus

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GARY THACKER, VENIDA L. THACKER, Plaintiffs - Appellants, versus TENNESSEE VALLEY AUTHORITY, Defendant - Appellee.

07/21/2016	CIVIL APPEAL DOCKETED. Notice of appeal filed by Appellants Gary Thacker and Venida L. Thacker on 07/21/2016. Fee Status: Fee Paid. No hearings to be transcribed. The appellant's brief is due on or before 08/30/2016. The appendix is due no later than 7 days from the filing of the appellant's brief. Awaiting Appellant's CIP Due on or before 08/12/2016 as to Appellant Gary Thacker [Entered: 07/29/2016 12:29 PM]
08/01/2016	APPEARANCE of Counsel Form filed by Edwin W. Small for TVE. (ECF: Edwin Small) [Entered: 08/01/2016 01:25 PM]
08/01/2016	Added Attorney Edwin Warren Small for Appellee TVE, in case 16-15105. [Entered: 08/01/2016 03:54 PM]
08/01/2016	E-filed Appearance of Counsel processed for Attorney Edwin Warren Small for Appellee TVE in 16-15105. [Entered: 08/01/2016 03:54 PM]

08/03/2016	APPEARANCE of Counsel Form filed by James S. Chase for TVA (ECF: James Chase) [Entered: 08/03/2016 03:43 PM]
08/03/2016	E-filed Appearance of Counsel processed for Attorney James S. Chase for Appellee TVE in 16-15105. [Entered: 08/03/2016 04:13 PM]
08/16/2016	Kenneth B. Cole, Jr., Gary Vestal Conchin, and Franklin Taylor Rouse for Appellants Gary Thacker and Venida L. Thacker have been notified that upon expiration of fourteen (14) days from this date, this appeal will be dismissed by the clerk without further notice unless the required Civil Appeal Statement has been received. A motion to file the Civil Appeal Statement out of time should also be filed at this time. [Entered: 08/16/2016 08:42 AM]
08/16/2016	NOTICE OF CIP FILING DEFICIENCY to Kenneth B. Cole, Jr., Gary Vestal Conchin, and Franklin Taylor Rouse for Gary Thacker and Venida L. Thacker. You are receiving this notice because you have not completed the Web-Based Stock Ticker Symbol CIP via the court's public web-page and have not filed the CIP via the electronic filing system (CM/ECF). Failure to comply with 11th Cir. Rules 26.1-1 through 26.1-4 may result in dismissal of the case or appeal under 11th Cir. R. 42-1(b), return of deficient

	documents without action, or other sanctions on counsel, the party, or both. [Entered: 08/16/2016 08:47 AM]
08/19/2016	APPEARANCE of Counsel Form filed by Kenneth Bridges Cole, Jr. for Gary Thacker and Venida L. Thacker. (ECF: Kenneth Cole) [Entered: 08/19/2016 03:11 PM]
08/19/2016	Certificate of Interested Persons and Corporate Disclosure Statement filed by Attorney Kenneth Bridges Cole, Jr. for Appellants Gary Thacker and Venida L. Thacker. On the same day the CIP is served, the party filing it must also complete the court's web-based stock ticker symbol certificate at the link here http://www.ca11.uscourts.gov/web-based-cip or on the court's website. See 11th Cir. R. 26.1-2(b). (ECF: Kenneth Cole) [Entered: 08/19/2016 03:12 PM]
08/19/2016	*TIME SENSITIVE MOTION for leave to file Motion to File Civil Appeal Statement Out of Time out of time filed by Gary Thacker and Venida L. Thacker. Opposition to Motion is Unknown. [7887693-1]* (ECF: Kenneth Cole) [Entered: 08/19/2016 03:30 PM]
08/19/2016	E-filed Appearance of Counsel processed for Attorney Kenneth Bridges Cole Jr. for Appellant Venida L. Thacker in 16-15105, Attorney Kenneth Bridges Cole Jr. for Appellant Gary Thacker in 16-15105. [Entered: 08/19/2016 04:28 PM]

08/30/2016	Appellant's brief filed by Gary Thacker and Venida L. Thacker. (ECF: Kenneth Cole) [Entered: 08/30/2016 11:58 AM]
08/30/2016	Appendix filed [1 VOLUMES] by Appellants Gary Thacker and Venida L. Thacker. (ECF: Kenneth Cole) [Entered: 08/30/2016 11:59 AM]
09/01/2016	Received paper copies of EBrief filed by Appellants Gary Thacker and Venida L. Thacker. [Entered: 09/02/2016 07:59 AM]
09/02/2016	Received paper copies of EAppendix filed by Appellants Gary Thacker and Venida L. Thacker. 1 VOLUMES - 4 SETS [Entered: 09/02/2016 08:01 AM]
09/06/2016	ORDER: The appellants' motion for leave to file the civil appeal statement form out of time is GRANTED. (CW) [7887693-2] [Entered: 09/06/2016 02:23 PM]
09/06/2016	Civil Appeal Statement filed by Attorney Kenneth Bridges Cole, Jr. for Appellants Gary Thacker and Venida L. Thacker. [Entered: 09/06/2016 02:27 PM]
09/09/2016	APPEARANCE of Counsel Form filed by David Demar Ayliffe for TVE. (ECF: David Ayliffe) [Entered: 09/09/2016 01:34 PM]
09/09/2016	E-filed Appearance of Counsel processed for Attorney David Demar Ayliffe for Appellee TVE in 16-15105. [Entered: 09/09/2016 05:29 PM]

09/29/2016	Appellee's Brief filed by Appellee TVE. (ECF: Edwin Small) [Entered: 09/29/2016 02:04 PM]
09/30/2016	Received paper copies of EBrief filed by Appellee TVE. [Entered: 10/03/2016 08:30 AM]
10/13/2016	Reply Brief filed by Appellants Gary Thacker and Venida L. Thacker. (ECF: Kenneth Cole) [Entered: 10/13/2016 01:35 PM]
10/14/2016	Received paper copies of EBrief filed by Appellants Gary Thacker and Venida L. Thacker. [Entered: 10/20/2016 11:43 AM]
02/03/2017	The Court has determined that oral argument will be necessary in this case. Please forward 3 additional copies of the 1 volumes of Appendix filed 8/30/16 by Attorney Kenneth Bridges Cole, Jr. for Appellants Gary Thacker and Venida L. Thacker to the Clerk's Office, Attention: Jenifer Tubbs. Your prompt attention to this matter is appreciated. [Entered: 02/03/2017 03:12 PM]
02/10/2017	Additional copies of Appendix (3 sets - 1 vol ea) received from Kenneth Bridges Cole, Jr. for Gary Thacker and Venida L. Thacker and Gary Vestal Conchin for Gary Thacker and Venida L. Thacker and forwarded to the record room. [Entered: 02/10/2017 03:29 PM]

02/15/2017	Assigned to tentative calendar number 18 in Montgomery during the week of April 24, 2017. Counsel must be logged into CM/ECF in order to view the attached calendar. [Entered: 02/15/2017 10:10 AM]
03/10/2017	Calendar issued as to cases to be orally argued the week of 04/24/2017 in Montgomery, Alabama. Counsel are directed to electronically acknowledge receipt of this calendar by docketing the Calendar Receipt Acknowledged event in ECF. Counsel must be logged into CM/ECF in order to view the attached calendar. [Entered: 03/10/2017 11:02 AM]
03/10/2017	Attorney Edwin Warren Small for Appellee TVE hereby acknowledges receipt of a copy of the printed calendar for 04/28/2017. Edwin W. Small 865-632-3021 will present argument. (ECF: Edwin Small) [Entered: 03/10/2017 02:39 PM]
03/10/2017	Oral argument scheduled. Argument Date: Friday, 04/28/2017 Argument Location: Montgomery, AL. [Entered: 03/10/2017 02:43 PM]
03/10/2017	*MOTION for appointment of counsel filed by Gary Thacker and Venida L. Thacker. Motion is Unopposed. [8067208-1]* (ECF: Kenneth Cole) [Entered: 03/10/2017 04:08 PM]

03/22/2017	Attorney Kenneth Bridges Cole, Jr. for Appellants Gary Thacker and Venida L. Thacker hereby acknowledges receipt of a copy of the printed calendar for 04/28/2017. Kenneth B. Cole, Jr. 256-705-7777 will present argument. (ECF: Kenneth Cole) [Entered: 03/22/2017 10:12 AM]
03/24/2017	ORDER: Motion to add Counsel Franklin Taylor Rouse as additional counsel for the Appellant is GRANTED. ENTERED FOR THE COURT - BY DIRECTION. [8067208-2] Attorney(s) Franklin Taylor Rouse for party(s) Appellant Gary Thacker, in case 16-15105. [Entered: 03/24/2017 03:48 PM]
04/28/2017	Oral argument held. Oral Argument participants were Kenneth Bridges Cole, Jr. for Appellants Gary Thacker and Venida L. Thacker and Edwin Warren Small for Appellee TVE. [Entered: 05/01/2017 10:33 AM]
08/22/2017	Opinion issued by court as to Appellants Gary Thacker and Venida L. Thacker. Decision: Affirmed. Opinion type: Published. Opinion method: Per Curiam. The opinion is also available through the Court's Opinions page at this link http://www.ca11.uscourts.gov/opinions. [Entered: 08/22/2017 09:03 AM]
08/22/2017	Judgment entered as to Appellants Gary Thacker and Venida L. Thacker. [Entered: 08/22/2017 09:05 AM]

09/12/2017	Petition for panel rehearing only filed by Appellants Gary Thacker and Venida L. Thacker. (ECF: Kenneth Cole) [Entered: 09/12/2017 01:32 PM]
09/15/2017	Received paper copies of E-PFR filed by Appellants Gary Thacker and Venida L. Thacker. [Entered: 09/19/2017 10:12 AM]
11/28/2017	ORDER: Petition for panel rehearing only filed by Appellants Gary Thacker and Venida L. Thacker is DENIED. [8308390-1] [Entered: 11/28/2017 10:16 AM]
12/06/2017	Mandate issued as to Appellants Gary Thacker and Venida L. Thacker. [Entered: 12/06/2017 01:02 PM]
02/28/2018	Notice of Writ of Certiorari filed as to Appellants Gary Thacker and Venida L. Thacker. SC# 17-1201. [Entered: 03/01/2018 02:58 PM]
04/11/2018	Checked status of ceritorari 17-1201 filed as to Appellants Gary Thacker and Venida L. Thacker - Pending. [Entered: 04/11/2018 04:00 PM]
05/14/2018	Checked status of ceritorari 17-1201 filed as to Appellants Gary Thacker and Venida L. Thacker - Pending. [Entered: 05/14/2018 04:11 PM]
06/21/2018	Checked status of ceritorari 17-1201 filed as to Appellants Gary Thacker and Venida L. Thacker - Pending. [Entered: 06/21/2018 10:52 AM]

07/24/2018	Checked status of ceritorari S Ct # 17-1201 filed as to Appellants Gary Thacker and Venida L. Thacker - Pending. [Entered: 07/24/2018 02:35 PM]
08/29/2018	Checked status of certiorari 17-1201 filed as to Appellants Gary Thacker and Venida L. Thacker - Pending. [Entered: 08/29/2018 11:52 AM]
09/27/2018	Writ of Certiorari filed as to Appellant Gary Thacker is GRANTED. SC# 17-1201. [Entered: 10/12/2018 11:38 AM]
10/01/2018	Checked status of certiorari S Ct # 17-1201 filed as to Appellant Gary Thacker - Pending. Cert was GRANTED on 9/28/18. AWaiting notice from USSC that cert has been granted. [Entered: 10/01/2018 03:25 PM]

U.S. District Court
Northern District of Alabama (Northeastern)
CIVIL DOCKET FOR CASE #:
5:15-cv-01232-AKK

Thacker et al v. Tennessee Valley Authority

Assigned to: Judge Abdul K Kallon

Case in other court: 11th Circuit Court of Appeals, 16-15105-CC

Cause: 28:1391 Personal Injury

Date Filed: 07/23/2015

Date Terminated: 05/23/2016

Jury Demand: Plaintiff

Nature of Suit: 360 P.I.: Other

Jurisdiction: Federal Question

Plaintiff

Gary Thacker

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Plaintiff

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ATTORNEY TO BE NOTICED

Kenneth Bridges Cole , Jr
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LEAD ATTORNEY
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Franklin Taylor Rouse
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V.

Defendant

Tennessee Valley Authority

represented by **David D Ayliffe**
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Date Filed	#	Docket Text
07/23/2015	1	COMPLAINT against Tennessee Valley Authority filed by Venida L. Thacker and Gary Thacker.(SPT) (Entered: 07/23/2015)

Date Filed	#	Docket Text
07/23/2015	2	Request for service by certified mail filed by Gary Thacker and Venida L. Thacker. (SPT) (Entered: 07/23/2015)
07/23/2015	3	NOTICE Regarding Consent to Magistrate Judge Jurisdiction. (SPT) (Entered: 07/23/2015)
07/24/2015		Filing Fee: Filing fee $ 400, receipt_number 1126–2439775 (B4601063945). related document 1 COMPLAINT against Tennessee Valley Authority filed by Venida L. Thacker and Gary Thacker.(SPT). (Cole, Kenneth) Modified on 7/27/2015 (SPT). (Entered: 07/24/2015)
08/10/2015	4	Summons Issued as to Tennessee Valley Authority by Clerk and delivered to Plaintiff for service. (SPT) (Entered: 08/10/2015)
08/20/2015	5	SUMMONS Returned Executed by Venida L. Thacker and Gary Thacker. Tennessee Valley Authority served on 8/13/2015, answer due 10/13/2015. (SPT) (Entered: 08/20/2015)
09/11/2015	6	MOTION to Consolidate Cases by Gary Thacker, Venida L. Thacker. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)(Cole, Kenneth) (Entered: 09/11/2015)

Date Filed	#	Docket Text
09/25/2015	7	RETURN OF SERVICE by Gary Thacker, Venida L. Thacker re 6 MOTION to Consolidate Cases *was sent by certified mail and returned to Conchin, Cloud & Cole, LLC. on 9/24/2015* (Cole, Kenneth) (Entered: 09/25/2015)
10/05/2015	8	NOTICE of Appearance by Franklin Taylor Rouse on behalf of Gary Thacker, Venida L. Thacker (Rouse, Franklin) (Entered: 10/05/2015)
01/05/2016	9	Summons Issued as to the U.S. Attorney and U.S. Attorney General by Clerk and delivered to Plaintiff for service. (SPT) (Entered: 01/05/2016)
01/12/2016	10	SUMMONS Returned Executed by Venida L. Thacker, Gary Thacker. Tennessee Valley Authority served on 1/8/2016, answer due 3/8/2016. (Cole, Kenneth) (Entered: 01/12/2016)
03/08/2016	11	MOTION to Dismiss for Lack of Jurisdiction *Based on the Discretionary Function Exception* by Tennessee Valley Authority. (Chase, James) (Entered: 03/08/2016)
03/08/2016	12	Brief re 11 MOTION to Dismiss for Lack of Jurisdiction *Based on the Discretionary Function Exception* filed by Tennessee Valley Authority. (Attachments: # 1

Date Filed	#	Docket Text
		Affidavit Declaration of Chrisopher Shane Carman, # 2 Exhibit Unpubplished Opinion, Dickerson v. TVA)(Chase, James) (Entered: 03/08/2016)
03/10/2016	13	NOTICE OF REASSIGNMENT; the parties having not unanimously consented to the dispositive jurisdiction by a Magistrate Judge, the case has been randomly reassigned to Judge Abdul K Kallon. Magistrate Judge Harwell G Davis, III no longer assigned to the case. (SPT) (Entered: 03/10/2016)
03/15/2016	14	MOTION to Consolidate Cases by Gary Thacker, Venida L. Thacker. (Cole, Kenneth) (Entered: 03/15/2016)
03/18/2016	15	ORDER SETTING BRIEFING SCHEDULE re dft's 11 MOTION to Dismiss for Lack of Jurisdiction Based on the Discretionary Function Exception. Plff's response is due by 3/29/2016; dft's reply is due by 4/1/2016. Signed by Judge Abdul K Kallon on 3/18/2016. (YMB) (Entered: 03/18/2016)
03/22/2016	16	RESPONSE in Opposition re 14 MOTION to Consolidate Cases filed by Tennessee Valley Authority. (Attachments: # 1 Exhibit Sept. 30,

Date Filed	#	Docket Text
		2015 transmittal letter remanding case to state court)(Chase, James) (Entered: 03/22/2016)
03/29/2016	17	RESPONSE in Opposition to Dft's 11 MOTION to Dismiss for Lack of Subject Matter Jurisdiction, filed by Gary Thacker, Venida L. Thacker. (Cole, Kenneth) Modified on 3/29/2016 (YMB). (Entered: 03/29/2016)
04/01/2016	18	MOTION for Leave to File *Reply Brief in Excess of Page Limitations (Unopposed)* by Tennessee Valley Authority. (Chase, James) (Entered: 04/01/2016)
04/01/2016	19	REPLY Brief in Further Support of 11 MOTION to Dismiss for Lack of Jurisdiction Based on the Discretionary Function Exception, filed by Defendant Tennessee Valley Authority. (Chase, James) Modified on 4/1/2016 (YMB). (Entered: 04/01/2016)
05/23/2016	20	ORDER–The TVA's motion to dismiss 11 is GRANTED and this matter is DISMISSED without prejudice for lack of subject matter jurisdiction. Signed by Judge Abdul K Kallon on 5/23/2016. (AVC) (Entered: 05/23/2016)

Date Filed	#	Docket Text
05/23/2016	21	TEXT ORDER –In light of the court's denial of the motion to reconsider in *Brown v. Condux Tesmex, Inc., et al.*, No. 5:15–cv–1505–AKK, the motions to consolidate, docs. 6 , 14 , are MOOT. Signed by Judge Abdul K Kallon on 5/23/2016. (AVC) (Entered: 05/23/2016)
07/21/2016	22	NOTICE OF APPEAL as to 20 Order Dismissing Case by Gary Thacker, Venida L. Thacker. Filing fee $505.00, receipt number 1126–2667000 (NDAL credit card receipt no. B4601073092). (Conchin, Gary) Modified on 7/22/2016 (YMB). (Entered: 07/21/2016)
07/21/2016	23	NOTICE of Transmittal re 22 Notice of Appeal. (YMB) (Entered: 07/21/2016)
07/21/2016	24	Transmission of Docket Sheet, 20 Order Dismissing Case, 22 Notice of Appeal, and 23 Notice of Transmittal to US Court of Appeals. (YMB) (Entered: 07/21/2016)
07/29/2016	25	USCA Case Number 16–15105–CC for 22 Notice of Appeal filed by Gary Thacker, Venida L. Thacker. (YMB) (Entered: 07/29/2016)

Date Filed	#	Docket Text
10/04/2016		Pursuant to F.R.A.P. 11(c), the Clerk of the District Court for the Northern District of Alabama certifies that the record is complete for purposes of this appeal re: 22 Notice of Appeal, Appeal No. 16–15105–CC. The entire record on appeal is available electronically. (YMB) (Entered: 10/04/2016)
12/06/2017	26	MANDATE of USCA before Ed Carnes, Chief Judge, and Rosenbaum and Dubina, Circuit Judges; AFFIRMIND the decision of the District Court w/per curiam opinion attached; ISSUED AS MANDATE 12/6/2017. (Attachments: # 1 Exhibit USCA Opinion) (KBB) (Entered: 12/06/2017)

[ENTERED: July 23, 2015]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

GARY THACKER AND VENIDA L. THACKER,	)	
Plaintiffs,	)	
v.	)	**Civil Action No.: _____**
TENNESSEE VALLEY AUTHORITY,	)	
Defendant.	)	

COMPLAINT

Gary Thacker and Venida L. Thacker, Plaintiffs in the above-styled cause, complain of the Defendant as follows:

PARTIES

1. Plaintiff Gary Thacker is an adult resident citizen of Limestone County, Alabama.

2. Plaintiff Venida L. Thacker is an adult resident citizen of Limestone County, Alabama, and is the wife of Gary Thacker.

3. Defendant Tennessee Valley Authority (TVA) was created by the Tennessee Valley Authority Act of 1933, Pub. L. No. 73-17, 48 Stat. 58

(1933) (Preamble); 16 U.S.C. § 831. The purposes of the TVA Act were to improve navigability and to provide for flood control of the Tennessee River, reforestation and proper use of marginal lands in the Tennessee Valley, and agricultural and industrial development. The Act also empowered TVA to dispose of surplus power generated as incident to navigation and flood control. *See* 16 U.S.C. §§ 831(i); 831(h)(l). Congress "intend[ed] that [TVA] shall have much of the essential freedom and elasticity of a private business corporation." H.R. Rep. No. 130, 73d Cong., 1st Sess., at 19 (1933). TVA has used this flexibility and independence to become a substantial commercial enterprise. TVA is the largest public power company in the United States and operates one of the largest electric power systems in North America, supplying electric power to more than 8.6 million customers in parts of seven states. In 2005, TVA spent approximately $6.5 billion to operate its power system, which generated approximately $7.8 billion in annual revenues. These revenues are kept by the TVA to support its further corporate enterprises, and it is only required to pay a portion of its revenues to the United States Treasury. Thus, TVA is an independent corporation with nearly complete autonomy from direction and oversight of the U.S. government, and any judgment against it is not paid out of U.S. Treasury funds. For that reason Congress has specifically excepted TVA from the auspices of a suit against the United States, and the TVA may sue and be sued in its corporate name. *See* 16 U.S.C. § 83lc(b).

JURISDICTION AND VENUE

4. This Court has original jurisdiction over this action pursuant to Congressional waiver of suit against TVA under 16 U.S.C. § 831c(b).

5. Venue is proper in this district under 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to this claim occurred in this district and division, specifically in Limestone County, Alabama.

FACTS

6. For many years, TVA had a uniformed patrol division commonly referred to as "the TVA Police." While the TVA Police existed, they patrolled boat traffic on the Tennessee River. This work patrolling boat traffic on the Tennessee River involved the use of official TVA Police boats equipped with blue strobe lights and sirens and public address units. In 2012, however, TVA made the decision to eliminate the TVA Police as part of a restructuring process. The planned and calculated dissolution of the TVA Police occurred at a time when the TVA Police had 61 uniformed officers. Rather than continue to employ these 61 uniformed officers and allow them to continue to patrol boat traffic on the Tennessee River with officially marked police boats equipped with blue strobe lights, sirens, and public address capability, the TVA chose to eliminate the entire TVA Police including all 61 of these officers. As a poor replacement for these 61 officers and their marked police boats, TVA made the decision to tum over some of their duties to contractors and/or use electronic surveillance, and to then depend on local law enforcement for the rest of

their duties. As one local law enforcement official said at the time TVA made this announcement in 2012, "This is a decision made by folks a long way from here that don't have any personal contact with the community. If you lived here, worked here, and cared for the area, you wouldn't do this." As of this time in 2012, therefore, TVA knew that it had substantially weakened its ability to properly and effectively patrol boat traffic on the Tennessee River. TVA also would have known that this weakened ability to patrol boat traffic on the Tennessee River could be an even more important factor in the event that an emergency situation of some kind was created on or around the Tennessee River. For that reason, TVA should have instituted heightened and stringent criteria for contractors to qualify to perform boat patrol activities and should have instituted and/or required training for contractors in the proper procedures to patrol boat traffic on the Tennessee River in the event of any emergency situation.

7. In early July of 2013, TVA began replacing old conductors on the Trinity-Browns Ferry 161 kV transmission lines that crossed the waters of the Tennessee River with new conductors. The work required use of a puller, a tensioner, and a pulling cable. As this work continued, TVA determined that a larger puller was needed. This new puller was procured on July 25, 2013. The new puller had a maximum working force of 40,000 pounds and a manually set safety limit of 22,000 pounds. The rated tensile strength of the pulling cable was greater than 50,000 pounds.

8. On July 30, 2013, TVA was replacing the last of three phase conductors on the Trinity-Browns Ferry 161 kV transmission line. TVA personnel were using the pulling cable to pull a running board that had the three phase conductors attached to the other side of the board across the river.

9. On information and belief, TVA had contracted with the owner/operator of two boat crews that were patrolling the Tennessee River while the overhead work was being performed. Neither boat was marked with any official TVA or government markings. Neither boat was equipped with blue lights, sirens, or public address capability. "Boat One" was designated with patrolling on the southern shore of the River to the River's midpoint; and "Boat Two" was designated with patrolling on the northern shore of the River to the River's midpoint. On information and belief, the only warning device associated with these two boats was one orange flag.

10. At approximately 2:40 p.m., the pulling cable failed, thereby allowing the new conductor to fall into the Tennessee River. This conductor stretched between the nearest two power line towers, with the central most part of the conductor partially looping down into the water. The area where the conductor contacted the water was in the channel used by most boat traffic.

11. TVA knew that the conductor looping down into the channel of the Tennessee River created a dangerous situation. TVA knew it did not have trained and experienced TVA Police to patrol the area. TVA knew that both commercial boat

traffic and recreational boat traffic would be traveling on the Tennessee River on a sunny July afternoon. TVA knew, or certainly should have known, that a recreational fishing tournament would begin approximately five miles to the east in approximately three hours. TVA knew it did not have enough patrol boats. TVA chose to not bring in additional patrol boats to monitor the situation and protect the public.

12. Instead, the TVA expanded the patrol area of Boat One and Boat Two in a misguided attempt to keep recreational boats from coming into contact with the downed line, requiring both crews to patrol the entire width of the River, with Boat One on the east side of the downed line, and Boat Two on the west side of the downed line. If anything, this decision by the TVA diluted the already inadequate ability of Boat One and Boat Two to patrol the channel where the conductor contacted the water.

13. TVA did not take any steps to mark the downed conductor and/or the area of the channel in which the conductor hung with any warning flags, markers, or buoys of any kind.

14. The Tennessee River is approximately 1.25 miles wide in the area where the downed conductor contacted the river. The channel is an area approximately 100 yards wide. The downed conductor was partially submerged in this channel.

15. Thus, while Boat One and Boat Two were charged with patrolling the entire width of the River, there was only a 100 yard wide area that needed to be patrolled. This area was where the

hazard existed and where most boat traffic could be expected.

16. Late that afternoon, a recreational fishing tournament began approximately five miles upstream on the Tennessee River to the east, launching out of Ingalls Harbor. This fishing tournament was held every Tuesday as a fun, recreational fishing activity. Gary Thacker participated in the tournament with his fishing partner Anthony J. Szozda, as they had done many times before, and the two launched from Ingalls Harbor at approximately 5:30 p.m. along with several other boats participating in the tournament.

17. Approximately 5 minutes after the tournament started, which was approximately three hours after the conductor fell into the water, Thacker and Szozda were traveling west on the Tennessee River on their way to one of their favorite fishing holes. They were never warned of the downed line, either before they launched their boat at Ingalls Harbor or after they were on the water. They were never stopped by Boat One or Boat Two; never saw any warning flags, buoys, or markers either on the line or in the water; and never saw Boat One or Boat Two in the channel where the conductor created the hazard to their lives and safety. In fact, Boat One and Boat Two were not even in the area.

18. The TVA workers were trying to raise the conductor at the same time Thacker and Szozda arrived in the area. The conductor was raised slightly just before they were about to go over it. Instead of being able to pass safely over it, therefore, the TVA conductor struck their boat, hit Szozda in

the neck, nearly decapitating him and killing him instantly, and striking Thacker in the head and torqueing his body about. Thacker suffered serious physical injuries that resulted in surgical intervention to repair damage to his spine.

19. Boat Two, which was on the far side of the conductor from Thacker's path of approach, arrived near Thacker after the fact of the collision with the conductor. Boat One, which was on the side of the conductor from which Thacker approached, failed to even attempt to stop Thacker's boat prior to the collision. The pilot of Boat Two, upon seeing the essentially decapitated Szozda in the boat, called 911. He then instructed Thacker to drive his boat back to Ingalls Harbor, approximately 5 miles away. Thacker made this entire drive with his essentially headless friend's body still in the boat with him.

20. Investigators inspected the area where the collision happened at approximately 7:45p.m., more than two hours after the fatal event and five hours after the conductor fell into the water. TVA had still failed to place any warning flags, emergency markings, or buoys on the downed conductor or in the water. Even after it knew of Szozda's death and Thacker's injuries, TVA did nothing to prevent any similar harm happening to anyone else.

21. TVA failed to properly qualify the contractors and/or employees that worked on this job; failed to properly plan for emergency situations like the situation that was created by its contractors and/or employees; failed to properly investigate the qualifications and/or training of its contractors

and/or employees; failed to properly train its contractors and/or employees; failed to properly instruct its contractors and/or employees in how to respond to the emergency and protect the public; and failed to properly supervise its contractors and/or employees in their response to the emergency and the inadequate steps taken to protect the public.

22. As a proximate result of TVA's conduct, Thacker has suffered severe personal injuries necessitating surgical intervention, reasonable and necessary medical bills, extreme emotional distress and mental anguish, and loss of enjoyment oflife in the past, and anticipates that he will continue to suffer from these injuries and conditions in the future and for the rest of his life.

23. As a proximate result of TVA's conduct, Venida L. Thacker has suffered loss of consortium damages because she has had to provide nursing services and care to her husband which otherwise would not have been necessary and because she and Mr. Thacker have not been able to have and enjoy the normal and healthy relationship they previously enjoyed as husband and wife, both because of the physical limitations that have plagued Mr. Thacker and because of the severe mental and emotional distress and anguish with which he now lives.

COUNT ONE

NEGLIGENCE

24. Plaintiffs adopt all preceding paragraphs and incorporate them by reference as if fully set forth herein.

25. TVA owed a duty to exercise reasonable care in the assembly and installation of the power lines across the Tennessee River. TVA also had a duty to exercise reasonable care in warning boaters on the Tennessee River of the hazards it created.

26. TVA breached the above duties.

27. TVA's negligence was a direct and proximate cause of Plaintiffs' injuries.

WHEREFORE, Plaintiffs request for a verdict against Defendant Tennessee Valley Authority in an amount sufficient to fairly and reasonably compensate them for the harm caused by the wrongful conduct of Tennessee Valley Authority.

COUNT TWO

WANTONNESS

28. Plaintiffs adopt all preceding paragraphs and incorporate them by reference as if fully set forth herein.

29. TVA owed a duty to exercise reasonable care in the assembly and installation of the power lines across the Tennessee River. TVA also had a duty to exercise reasonable care in warning boaters on the Tennessee River of the hazards it created.

30. TVA wantonly breached the above duties.

31. TVA's wantonness was a direct and proximate cause of Plaintiffs' injuries.

WHEREFORE, Plaintiffs request for a verdict against Defendant Tennessee Valley Authority in an amount sufficient to fairly and reasonably compensate them for the harm caused by the wrongful conduct of Tennessee Valley Authority and in an amount sufficient to preserve life, punish the defendants, protect the public, and prevent similar wrongs in the future.

Respectfully submitted on this 23rd day of July, 2015.

/s/ Gary V. Conchin
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JURY DEMAND

Plaintiffs demand a trial by struck jury.

/s/ Gary V. Conchin
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/s/ Kenneth B. Cole, Jr.
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SERVICE

Please serve Defendant via certified mail as follows:

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[ENTERED: March 8, 2016]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

GARY THACKER, ET UX.,

Plaintiffs,

v. No. 5:15-cv-01232-HGD

TENNESSEE VALLEY AUTHORITY,

Defendant.

MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION BASED ON THE DISCRETIONARY FUNCTION EXCEPTION

Pursuant to Federal Rule of Civil Procedure 12(b)(1), Defendant Tennessee Valley Authority (TVA) moves the Court to dismiss this action for lack of subject matter jurisdiction based on the discretionary function exception.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically through the Court's ECF system on the date shown in the document's ECF footer. Notice of this filing will be sent by operation of the Court's ECF system to counsel for all other parties as indicated on the electronic filing receipt and listed below. Parties may access this filing through the Court's ECF system.

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[ENTERED: March 8, 2016]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

GARY THACKER, ET UX.,

Plaintiffs,

v. No. 5:15-cv-01232-HGD

TENNESSEE VALLEY AUTHORITY,

Defendant.

BRIEF IN SUPPORT OF TVA'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION BASED ON THE DISCRETIONARY FUNCTION EXCEPTION

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Pursuant to Federal Rule of Civil Procedure 12(b)(1), Defendant Tennessee Valley Authority (TVA) has moved the Court to dismiss this action for lack of subject matter jurisdiction based on the discretionary function exception. While TVA is generally subject to suit in tort under the TVA Act's sue-and-be-sued clause at 16 U.S.C. § 831c(b), discretionary functions are an exception to that waiver of sovereign immunity. As fully discussed below, the Court is without jurisdiction because the discretionary function exception applies to the alleged wrongful conduct of TVA in this case.

PERTINENT FACTS

The facts which are pertinent to the application of the discretionary function exception to this case are few and not subject to reasonable dispute.

On July 30, 2013, TVA was in the process of replacing an overhead conductor on the Government's Trinity-Browns Ferry 161-kV transmission line across the Wheeler Reservoir portion of the Tennessee River at river mile 297.5. (Compl., Doc. 1 ¶ 8.) The new overhead conductor was being pulled through pulleys near the tops of the transmission towers; because of the pulling tension on the conductor, it was far above the surface of the Reservoir. At approximately 2:40 p.m., the pulling cable failed, releasing the tension on the conductor and allowing the conductor to fall into the Tennessee River between the towers. (Compl., Doc. 1 ¶ 10.) TVA informed the United States Coast Guard of the situation at 3:10 p.m., and the Coast Guard established a Marine Safety Zone and closed the River to all vessels between Tennessee River miles 297-298. (Attach. 1, Carman Decl., ¶ 5.) Notice of the Marine Safety Zone and closure of the River was issued as a Coast Guard broadcast Notice to Mariners on marine radio channel VHF 16 at 3:40 p.m. and hourly thereafter in accordance with the regular schedule for Coast Guard broadcast Notices to Mariners.[1] (Attach. 1, Carman Decl., ¶ 5.) Once

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[1] The text of the Coast Guard's broadcast Notice to Mariners was:

> THE COTP [CAPTAIN OF THE PORT] OHIO VALLEY HAS ESTABLISHED A SAFETY ZONE FROM MM 297-298 TNR DUE TO

the Marine Safety Zone was established, it was a violation of Federal law for any vessel to navigate the River between river miles 297 and 298 without Coast Guard authorization. *See* 33 C.F.R. § 165.20 ("A Safety Zone is a water area . . . which, for safety . . . purposes, access is limited to authorized persons . . . or vessels."); 33 C.F.R. § 165.23 (prohibiting entry of a person or vessel into a Safety Zone).

At 5:30 p.m., a fishing tournament started at Ingalls Harbor, located approximately five miles upriver from the downed conductor. (Compl., Doc. 1 ¶ 16.) When the tournament started, Plaintiff Gary Thacker and a fishing partner proceeded downriver from Ingalls Harbor in Thacker's boat. (Compl., Doc. 1 ¶ 16.) Five minutes later they reached the location of the downed conductor (indicating they were traveling at an average boat speed of sixty miles per hour). (Compl., Doc. 1 ¶ 17.)

At the exact time that Plaintiff Thacker and his fishing partner reached the conductor location, the conductor was being pulled out of the water and back up to the pulleys at the tops of the transmission towers. (Compl., Doc. 1 ¶ 18.) Thus, "[i]nstead of being able to pass safely over" the conductor (Compl., Doc. 1 ¶ 18), Thacker's boat struck the conductor at a spot where the conductor was a short distance

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> PARTED CABLES AND LOW HANGING CABLES. NO VESSELS MAY ENTER THIS AREA WITHOUT THE PERMISSION OF CG SOHV [COAST GUARD SECTOR OHIO VALLEY]. CG SECTOR OHIO VALLEY IS STANDING BY ON CH. 16.

(Attach. 1, Carman Decl., ¶ 5.)

above the water. (Compl., Doc. 1 ¶ 18.) As a result of the incident, the fishing partner was killed and Thacker allegedly suffered physical injuries. (Compl., Doc. 1 ¶ 18.)

TVA had two patrol boats on the river at the site of the downed conductor crewed by TVA employees, but the river is over a mile wide at that location. (Compl., Doc. 1 ¶ 12, 14.) The patrol patterns of the boats were such that neither patrol boat was in a location to block Thacker's boat from proceeding as it approached the downed conductor at high speed. (Compl., Doc. 1 ¶ 12; Attach. 1, Carman Decl., ¶¶ 6-7.)

TVA'S CHALLENGED CONDUCT

The Complaint alleges that "TVA should have instituted heightened and stringent criteria for contractors to qualify to perform boat patrol activities and should have instituted and/or required training for contractors in the proper procedures to patrol boat traffic on the Tennessee River in the event of any emergency situation." (Compl., Doc. 1 ¶ 6.) The Complaint also alleges that TVA

- failed to properly qualify the contractors and/or employees that worked on this job;
- failed to properly plan for emergency situations;
- failed to properly investigate the qualifications and/or training of its contractors and/or employees;

- failed to properly train its contractors and/or employees;
- failed to properly instruct its contractors and/or employees in how to respond to the emergency and protect the public; and
- failed to properly supervise its contractors and/or employees in their response to the emergency and the inadequate steps taken to protect the public.

(Compl., Doc. 1 ¶ 21.)

In sum, then, the Complaint alleges that TVA failed to properly "qualify" and "train" its employees, failed to properly "plan for emergency situations," and failed to properly "instruct" and "supervise" its employees in their response to the emergency.

ARGUMENT

I. TVA's motion is a factual attack on the existence of subject matter jurisdiction.

In the Eleventh Circuit, it is well-settled that a Rule 12(b)(1) motion based on the discretionary function exception like TVA's motion here is a "factual" attack on the existence of subject matter jurisdiction. *U.S. Aviation Underwriters, Inc. v. United States*, 562 F.3d 1297, 1299 (11th Cir. 2009). In a factual challenge to the existence of subject matter jurisdiction, the plaintiff has the burden of proving jurisdiction in order to survive the motion, and no presumptive truthfulness attaches to the allegations of the complaint. *Slappey v. U.S. Army*

Corps of Eng'rs, 571 F. App'x 855, 856 (11th Cir. 2014) ("In such a case, the plaintiff bears the burden of proving that jurisdiction exists, *i.e.*, that the discretionary function exception does not apply."); *OSI, Inc. v. United States*, 285 F.3d 947, 951 (11th Cir. 2002) ("In the face of a factual challenge to subject matter jurisdiction, the burden is on the plaintiff to prove that jurisdiction exists."). In considering such a challenge, the Court may consider extrinsic evidence such as an affidavit. *Slappey*, 571 F. App'x at 856.

II. TVA is an executive branch agency of the United States and the discretionary function exception applies to TVA.

TVA is a constitutionally authorized executive branch agency of the United States, created by and existing pursuant to the TVA Act of 1933, 16 U.S.C. §§ 831 et seq. *See, e.g., Bobo v. AGCO Corp.*, 981 F. Supp. 2d 1130, 1137 (N.D. Ala. 2013) ("The Tennessee Valley Authority is a constitutionally authorized corporate agency and instrumentality of the United States."); *TVA v. United States*, 51 Fed. Cl. 284, 285 (2001) ("Both TVA and DOE are agencies within the executive branch, the heads of which are subject to presidential removal."). Pursuant to the TVA Act's sue-and-be-sued clause at 16 U.S.C. § 831c(b), TVA is generally subject to suit in its own name. *See United States v. Smith*, 499 U.S. 160, 168-69 (1991) ("Courts have read [the TVA Act's] 'sue or be sued' clause as making the TVA liable to suit in tort, subject to certain exceptions."). But that waiver of immunity does not alter TVA's status as an executive branch agency. *See U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S.

736, 744 (2004) (internal citations omitted) ("The sue-and-be-sued clause waives immunity, and makes the Postal Service amenable to suit, as well as to the incidents of judicial process. While Congress waived the immunity of the Postal Service, Congress did not strip it of its governmental status. The distinction is important."). Nor does it make TVA subject to suit in tort for the performance of discretionary functions—an exception to TVA's waiver of sovereign immunity that is grounded in constitutional separation of powers. *See Gordon v. Lykes Bros. S.S. Co.*, 835 F.2d 96, 100 (5th Cir. 1988) ("[D]eep constitutional roots . . . impart strength to the discretionary function exception."); *Payton v. United States*, 636 F.2d 132, 143 (5th Cir. 1981) ("The crux of the concept embodied in the discretionary function exception is that of the separation of powers.").

Thus, a number of decisions of this Court and the Eleventh Circuit hold that the discretionary function exception is applicable to TVA. For example, in holding the discretionary function exception applicable to certain asbestos exposure tort claims in *Bobo v. AGCO Corp.*, 981 F. Supp. 2d 1130, 1145 (N.D. Ala. 2013) (Smith, J.), the Court stated:

> The Eleventh Circuit affirmed the application of the discretionary function doctrine to TVA's statutorily-authorized, power-production activities, including management decisions at a TVA coal-fired power plant, in *Johns v. Pettibone Corp.*, 843 F.2d 464, 467 (11th Cir. 1988).

Similarly, in *North Alabama Electric Cooperative v. TVA*, 862 F. Supp. 2d 1291, 1301 (N.D. Ala. 2012) (Smith, J.), in holding TVA immune from allegations of promissory fraud, the Court stated:

> Although TVA generally is subject to suit, "courts have held that TVA cannot be subject to liability when engaged in certain governmental functions." *Peoples National Bank of Huntsville, Alabama v. Meredith*, 812 F.2d 682, 685 (11th Cir. 1987) (citations omitted). That so-called "nonliability" doctrine applies to discretionary governmental functions. *Id.*

Likewise, in *Dickerson* v. *TVA*, No. CV94-B-1031-NW, Mem. Op. at 10 n.6 (N.D. Ala. Jan. 31, 1995) (Blackburn, J.) (Attach. 2), in holding the discretionary function exception applicable to preclude personal injury claims arising out of TVA's alleged negligent maintenance of the roadway over Wheeler Dam, the Court stated:

> The principle of nonliability for discretionary functions has been held to apply to tort suits filed against TVA, in the same manner as it applies to tort suits involving other government agencies by virtue of the discretionary function exception, 28 U.S.C. § 2680(a) (1988), to the Federal Tort Claims Act. *E.g., Peoples Nat'l Bank v. Meredith*, 812 F.2d 682, 684-85 (11th Cir. 1987); *Queen v. TVA*, 689 F.2d 80, 86 (6th Cir.

1982), *cert. denied*, 460 U.S. 1082 (1983); *Morris v. TVA*, 345 F. Supp. 321 (N.D. Ala. 1972).

Hill v. TVA, 842 F. Supp. 1413 (N.D. Ala. 1993) (Hancock, J.), is in accord. There, the Court dismissed tort claims arising out of TVA's operation and management of Browns Ferry Nuclear Plant on discretionary function grounds, because "[w]hen TVA is engaged in a governmental function that is discretionary in nature, where the United States itself would not be liable, TVA cannot be subject to liability." *Id.* at 1420.

Atchley v. TVA, 69 F. Supp. 952 (N.D. Ala. 1947) (Lynne, J.), also is in accord. There, the Court dismissed tort claims against TVA based on alleged improper operation of Wheeler Reservoir, stating:

> The present case comes clearly within the principle that the performance by executive officers of discretionary governmental duties entrusted to them by statute is not subject to judicial review. This principle has been reiterated time and again in mandamus proceedings to compel executive action, in injunction suits to prevent executive action, and in actions such as that at bar for damages claimed to have resulted from executive action.

Id. at 955 (footnotes omitted).

III. A two-part test is utilized to determine the applicability of the discretionary function exception.

United States v. Gaubert, 499 U.S. 315, 324-25 (1991), established a two- part test for the discretionary function exception. Under *Gaubert*, challenged conduct of a Federal agency is not subject to suit in tort if (1) the challenged conduct was not in violation of a ***mandatory*** Federal statute, regulation or policy which dictated a ***specific*** course of action; and (2) the challenged conduct was ***susceptible*** to policy analysis involving political, social and economic judgments.

Numerous Eleventh Circuit cases illustrate the application of *Gaubert's* two- part test. *E.g.*, *Lewis v. United States*, 618 F. App'x 483 (11th Cir. 2015) (affirming district court holding that the discretionary function exception applied to decisions by prison guard about how to escort prisoner who slipped and fell while returning to cell after showering); *Slappey v. U.S. Army Corps of Eng'rs*, 571 F. App'x 855 (11th Cir. 2014) (affirming district court holding that that the discretionary function exception applied to Corps of Engineers decisions about the appropriate safety features for a dam and the placement of those features); *Hogan v. U.S. Postmaster General*, 492 F. App'x 33 (11th Cir. 2012) (affirming district court holding that the discretionary function exception applied to Postal Service decisions regarding public safety in slip-and-fall case at a post office); *U.S. Aviation Underwriters, Inc. v. United States*, 562 F.3d 1297, 1300 (11th Cir. 2009) (affirming district court holding that the discretionary function exception applied to alleged

negligence of National Weather Service in failing to issue warnings of clear air turbulence); *Cranford v. United States*, 466 F.3d 955, 959-61 (11th Cir. 2006) (affirming district court holding that the discretionary function exception applied to Coast Guard's alleged improper marking of and failure to remove a submerged wreck); *OSI, Inc. v. United States*, 285 F.3d 947, 952-53 (11th Cir. 2002) (affirming district court holding that the discretionary function exception applied to Air Force decisions regarding disposal of waste material in off-base landfill); *Monzon v. United States*, 253 F.3d 567, 568-69 (11th Cir. 2001) (affirming district court holding that the discretionary function exception applied to decision of whether to provide warnings of increased rip currents at beach controlled by the National Park Service); *Hughes v. United States*, 110 F.3d 765, 768-69 (11th Cir. 1997) (affirming district court holding that the discretionary function exception applied to Postal Service decisions regarding safety and security at a post office); *Autery v. United States*, 992 F.2d 1523, 1531 (11th Cir. 1993) (reversing district court decision and holding that discretionary function exception applied to dangerous tree inspection program at a national park).

There are several fundamental legal points related to application of the two- part test that are pertinent to the analysis here. First, the conduct of the Government being challenged must be sufficiently defined so the two-part test can be applied to the challenged conduct. *E.g.*, *Hogan v. U.S. Postmaster General*, 492 F. App'x 33, 35 (11th Cir. 2012) ("'Before we address whether the government's conduct violated a mandatory

regulation or policy, we must determine exactly what conduct is at issue.'" (quoting *Autery v. United States*, 992 F.2d 1523, 1527 (11th Cir. 1993)). Here, as noted above, the challenged conduct is defined in the Complaint for purposes of the discretionary function analysis.

That the challenged conduct may have been performed at an "operational level" as opposed to a "planning level" does not take the conduct outside the exception. *E.g.*, *Lewis v. United States*, 618 F. App'x 483, 487 (11th Cir. 2015) ("The fact that Officer Locker was exercising his discretion at the operational level, as opposed to the planning level, does not remove his action from the discretionary function exception.").

Negligence by the Government is irrelevant to the test; indeed, if freedom from negligence were required, the discretionary function exception would fail at the precise time it would be needed. *E.g.*, *Autery*, 992 F.2d at 1528 (pointing out that the "district court's analysis appears to collapse the question of whether the Park Service was negligent into the discretionary function inquiry" and citing cases for the principle that "[n]egligence is simply irrelevant to the discretionary function inquiry") (citation omitted).

The question is not whether a Government employee actually weighed policy considerations, but whether the nature of the challenged conduct is susceptible to policy analysis. *E.g.*, *Lewis v. United States*, 618 F. App'x 483, 486-87 (11th Cir. 2015) ("This Court looks to the nature of the actions taken and whether they are susceptible to policy analysis,

not to whether the employee actually weighed policy considerations before acting.").

And where there is room for a Government employee to exercise discretion, "'it must be presumed that the agent's acts are grounded in policy when exercising that discretion.'" *Slappey v. U.S. Army Corps of Eng'rs*, 571 F. App'x 855, 860 (11th Cir. 2014) (quoting *United States v. Gaubert*, 499 U.S. 315, 324 (1991)).

IV. The Discretionary Function Exception Applies Here.

The challenged conduct here is defined in the Complaint. As noted earlier the Complaint asserts that TVA failed to properly qualify and train its employees, failed to properly plan for emergencies, and failed to properly instruct and supervise its employees in their response to the emergency All of this challenged conduct is protected by the discretionary function exception.

As to the first part of the discretionary function test, the Complaint does not identify any mandatory Federal statute, regulation, or policy that specifically required TVA to act differently than it did. And, to TVA's knowledge, there was no such mandatory Federal statute, regulation, or policy in effect on July 30, 2013.

As to the second part of the discretionary function test, it is well settled that "'safety decisions represent an exercise of discretion giving rise to governmental immunity.'" *Johns v. Pettibone Corp.*, 843 F.2d 464, 467 (11th Cir. 1988) (quoting from and affirming a decision of this Court (*Johns v. Pettibone*

Corp., No. CV82-L-5630-NE (N.D.Ala. March 25, 1986) (Lynne, J.)) which involved an electrocution at TVA's Widows Creek Fossil Plant allegedly caused by decisions of TVA managers in their assignment and delegation of safety responsibilities). The reasoning of the Supreme Court's landmark discretionary function decision, *Dalehite v. United States*, 346 U.S. 15 (1953), *aff'g, In re Texas City Disaster Litig.*, 197 F.2d 771 (5th Cir. 1952) (en banc), illustrates the analysis, and it is directly applicable to the situation here.

Dalehite involved personal injury, death, and property damage claims arising out of the 1947 Texas City disaster, in which much of the city was destroyed by explosion and fire. *In re Texas City Disaster Litig.*, 197 F.2d at 772. The source of the disastrous explosion was ammonium nitrate fertilizer, which the Government had produced and was shipping through the port of Texas City as part of a foreign aid program. Among other things, the district court found the Government liable based on Government negligence in various phases of the manufacturing process, including the Government's use of TVA specifications allowing high bagging temperatures, which increased production and lowered costs but amplified the risk of fire and explosion. *Dalehite*, 346 U.S. at 39-40. The district court, after a trial, found the Government liable.

The Fifth Circuit reversed, holding that the discretionary function exception precluded Government liability. As to the high bagging temperatures adopted from TVA's specifications, the Fifth Circuit stated:

> Determination of bagging temperatures was clearly within the discretion of the proper officers. A suggestion was made to the Chief of Ordnance that it would be better practice to bag the product at 120 degrees Fa[h]renheit rather than at 200 degrees. The commanding officers at the ordnance plants reported that this procedure would reduce production to less than half of that demanded by the fertilizer program and the world situation . . . . This was nothing more nor less than the exercise of the discretionary function by reaching conclusions on balanced considerations for which the United States are exempt from liability "whether or not the discretion involved be abused."

In re Texas City Disaster Litig., 197 F.2d at 779.

The Supreme Court affirmed, pointing out that the challenged conduct involved decisions balancing safety risks against other project goals (cost and production schedule benefits of expedited manufacturing and shipping of fertilizer to accomplish foreign aid purposes) and was thus the kind of conduct precluded from judicial review in tort by the discretionary function doctrine:

> [T]he decision to bag at the temperature fixed was also within the [discretionary function] exception. Maximum bagging temperatures were first established under the TVA specifications. That they were the

> product of an exercise of judgment, requiring consideration of a vast spectrum of factors, including some which touched directly the feasibility of the fertilizer export program, is clear. . . . It would be possible to keep the product in graining kettles for a longer period or to install cooling equipment. But both methods would result in greatly increased production costs and/or greatly reduced production. This kind of decision is not one which the courts, under the [discretionary function exception], are empowered to cite as "negligence" . . . .

Dalehite, 346 U.S. at 40-41.

The reasoning of *Scruggs v. United States*, 959 F. Supp. 1537 (S.D. Fla. 1997), also is directly applicable to the situation here. In *Scruggs*, the pilot of a small airplane sued the Government for alleged damages and injuries caused by severe turbulence resulting from a high-speed Air Force jet fighter passing extremely close to plaintiff's small airplane as he was flying near Avon Park Gunnery Range in Florida. The incident occurred in "special use airspace" that was designated as a "Military Training Route" and used by Air Force fighters for high-speed low-level approaches to the gunnery range. The Government (through the Federal Aviation Administration) had issued Notices to Airmen about Air Force activities in the special use airspace and those Notices were available to civilian pilots, but Scruggs did not consult the Notices in planning the route of his flight. Among other things,

Scruggs claimed the Government was negligent in failing to adopt more safety measures than it did; specifically, Scruggs faulted the Government for failing to establish a radar site at the range to monitor nearby air traffic, failing to install a collision avoidance electronic system, and failing to designate the Military Training Route as restricted airspace. *Id.* at 1548. The court held that the Government's alleged negligence for failing to adopt more safety measures than it did fell squarely within the discretionary function exception:

> [T]he government is immune from suit under the discretionary function exception with respect to Plaintiffs' claim that the government was negligent for failing to implement certain safety measures.

959 F. Supp. at 1548.

Numerous other decisions are in accord that judgments by Government officials involving safety levels for Government activities on premises open to the public are within the discretionary function exception. *See, e.g., Slappey v. U.S. Army Corps of Eng'rs*, 571 F. App'x 855, 860 (11th Cir. 2014) ("[T]he Corps' decisions about the appropriate safety features for the dam, and the placement of those features, implicated many policy considerations."); *Hughes v. United States*, 110 F.3d 765, 768 (11th Cir. 1997) (holding discretionary function exception applicable to Postal Service decisions regarding safety and security at a post office because "security decisions such as the ones challenged here—the posting of security personnel in the lobby or in the

parking lot, the location and intensity of lighting, and the planting and maintenance of trees and shrubby—are left to the discretion of the Security Control Officer for each post office").

As to TVA's alleged failure to properly qualify, train, and instruct its employees for emergencies, and to properly supervise its employees in their response to the emergency, that is precisely the kind of challenged conduct that courts have universally found to be within the discretionary function exception. As shown by the following decisions, the courts have uniformly found that discretionary function exception precludes tort claims based on the Government's alleged negligent hiring, retention, training, and assignment of individuals to perform Government work (unless, of course, the individual does not have a specific certification mandated by the Government).

- *Snyder v. United States*, 590 F. App'x 505, 509-10 (6th Cir. 2014) (internal citations omitted):[2]

> This Circuit has consistently held that agency ***supervisory*** and ***hiring*** decisions fall within the discretionary function exception. This conclusion is consistent with the precedent of our sister Circuits.
>
> . . . .
>
> Because [agency] ***hiring***, ***supervision***, ***training***, and ***retention*** require policy judgments—the type that

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[2] Emphasis added here and throughout this brief unless otherwise noted.

> Congress intended to shield from tort liability—and because Plaintiff failed to allege the United States' nonconformance with any applicable regulations, we find that the district court lacked subject matter jurisdiction.

- *Dovenberg v. United States*, 407 F. App'x 149, 149 (9th Cir. 2010):

> Decisions regarding the ***training*** and ***supervision*** of government employees "fall squarely within the discretionary function exception" . . . .

- *LeRose v. United States*, 285 F. App'x 93, 97 (4th Cir. 2008):

> [D]ecisions regarding the ***hiring***, ***supervision*** and ***retention*** of [Government employees] are precisely the type of decisions that are protected under the discretionary function exception. . . . The hiring of an employee involves several public policy considerations including the weighing of the qualifications of candidates, weighing of the backgrounds of applicants, consideration of staffing requirements, evaluation of the experience of candidates, and assessment of budgetary and economic considerations.

- *Santana-Rosa v. United States*, 335 F.3d 39, 43-44 (1st Cir. 2003):

> Turning to the second segment of the *Gaubert* inquiry, the court must also conclude that decisions regarding . . . ***work assignments*** are susceptible to policy-related analysis.

- *Kelly v. United States*, 241 F.3d 755, 763 (9th Cir. 2001):

> We recently confirmed that "[t]his court and others have held that decisions relating to the . . . ***training*** . . . of employees usually involve policy judgments of the type Congress intended the discretionary function exception to shield." *Vickers v. United States*, 228 F.3d 944, 950 (9th Cir. 2000) (concluding that the Immigration and Naturalization Service's decision to excuse an employee from handgun ***training*** "involved a judgment that is subject to the discretionary function exception and is not actionable"); *accord Nurse v. United States*, 226 F.3d 996, 1001 (9th Cir. 2000) (concluding that alleged negligent and reckless ***training*** "fall[s] squarely within the discretionary function exception"); *Gager*, 149 F.3d at 922 (concluding that Postal Service's decision not to provide ***training*** to detect mail bombs "was clearly rooted in social, economic, and political policy" and protected by the discretionary function exception); *Fang*, 140 F.3d at 1242 (noting that decisions regarding ***training*** of emergency medical

> technicians are "fully protected by the discretionary function exception"); *Burkhart*, 112 F.3d at 1217 ("The extent of ***training*** with which to provide employees . . . [is] surely among those [decisions] involving the exercise of political, social, or economic judgment."); *Redmon v. United States*, 934 F.2d 1151, 1156 (10th Cir. 1991) (concluding that the FAA's decision to allow single- engine-rated pilots to carry over that rating to a multi-engine rating without a flight test "falls squarely within the discretionary function exception").

- *Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1217 (D.C. Cir. 1997) (internal citations omitted):

> The ***hiring, training,*** and ***supervision*** choices that WMATA faces are choices "susceptible to policy judgment." The ***hiring*** decisions of a public entity require consideration of numerous factors, including budgetary constraints, public perception, economic conditions, "individual backgrounds, office diversity, experience and employer intuition." . . . The extent of ***training*** with which to provide employees requires consideration of fiscal constraints, public safety, the complexity of the task involved, the degree of harm a wayward employee might cause, and the extent to which

> employees have deviated from accepted norms in the past. Such decisions are surely among those involving the exercise of political, social, or economic judgment.

- *Hudson v. United States*, No. 2:06-CV-01, 2008 WL 517009, at *6 (E.D. Tenn. Feb. 25, 2008) (holding the discretionary function doctrine to preclude alleged negligence in the hiring and supervision of contract physicians by the Veterans Administration):

> A review of relevant case law reveals a ***myriad*** of cases which hold that the ***hiring***, ***training***, and ***supervising*** of employees are discretionary in nature and fall within the discretionary function exception. *United States v. Gaubert*, 499 U.S. 315, 332-34, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991); *United States v. Varig Airlines*, 467 U.S. 797, 819-20, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984); *Wood v. United States*, 290 F.3d 29 (1st Cir. 2002); *Vickers v. United States*, 228 F.3d 944, 950 (9th Cir. 2000), *Burkhart v. Washington Metropolitan Area Transit Authority*, 112 F.3d 1207 (D.C. Cir. 1997); *Layton v. United States*, 984 F.2d 1496 (8th Cir.), *cert denied*, 510 U.S. 877, 114 S. Ct. 213, 126 L. Ed. 2d 170 (1993); *Fortney v. United States*, 912 F.2d 722 (4th Cir. 1990); *Michael v. United States*, 751 F.2d 303, 307 (8th Cir. 1985).

- *Scruggs v. United States*, 959 F. Supp. 1537, 1548 (S.D. Fla. 1997):

> [D]ecisions pertaining to . . . personnel ***training*** clearly involve the balancing of social, economic and political objectives and, thus, fall squarely within the protection of the discretionary function exception to the FTCA.

Plaintiffs have made no contention that any pertinent TVA employees failed to possess any specific certifications mandated by the Government. Accordingly, as shown by these cases, the discretionary function doctrine precludes Plaintiffs' claims based on the alleged negligent hiring, retention, training, assignment, and supervision.

CONCLUSION

For the reasons stated and upon the authorities cited, the Court should dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(1).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically through the Court's ECF system on the date shown in the document's ECF footer. Notice of this filing will be sent by operation of the Court's ECF system to counsel for all other parties as indicated on the electronic filing receipt and listed below. Parties may access this filing through the Court's ECF system.

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[ENTERED: March 29, 2016]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

GARY THACKER and VENIDA THACKER,	)	
Plaintiffs,	)	
v.	)	No. 5:15-cv-01232-AKK
TENNESSEE VALLEY AUTHORITY,	)	
Defendant.	)	

PLAINTIFFS GARY AND VENIDA THACKER'S RESPONSE IN OPPOSITION TO TENNESSEE VALLEY AUTHORITY'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

GARY THACKER, AND VENIDA THACKER,	)	
Plaintiff,	)	
v.	)	**No. 5:15-cv-1232-AKK**
TENNESSEE VALLEY AUTHORITY,	)	
Defendants.	)	

PLAINTIFFS' RESPONSE IN OPPOSITION TO TENNESSEE VALLEY AUTHORITY'S MOTION TO DISMISS

Plaintiffs Gary and Venida Thacker respond in opposition to Tennessee Valley Authority's ("TVA") Motion to Dismiss for Lack of Subject Matter Jurisdiction Based (Doc. 11) as follows:

INTRODUCTION

The TVA Act's "Sue and be Sued" clause constitutes a broad waiver of sovereign immunity. TVA has a unique existence and performs both governmental and non-governmental functions. Courts have consistently held that TVA's power generating activities are not a governmental function, and therefore are not protected by discretionary immunity. TVA's actions complained of herein were commercial activities and are not protected by any immunity. Therefore, this Honorable Court has subject matter jurisdiction over this case.

PERTINENT FACTS

Plaintiffs incorporate by reference as if set forth fully herein Paragraphs 6 through 22 of their Complaint (Doc. 1) because no discovery has occurred and Plaintiffs have no new information.

TVA BACKGROUND

Although formed by an act of Congress, TVA is a corporation. The purposes of the TVA Enabling Act were to improve navigability and to provide for flood control of the Tennessee River, reforestation and proper use of marginal lands in the Tennessee Valley, and agricultural and industrial development of the valley. *See* 16 U.S.C. § 831. While the Act also empowered TVA to dispose of "surplus power" generated as an incident to navigation and flood control, those activities are subordinated to the needs of navigation and flood control. *See* 16 U.S.C. §§ 831i; 83lh-1; Tennessee Elec. Power Co. v. TVA,

21 F. Supp. 947, 959 (E.D. Tenn. 1938).[1] Congress "intend[ed] that [TVA] shall have much of the essential freedom and elasticity of a private business corporation." H.R. Rep. No. 130, 73d Cong., 1st Sess., at 19 (1933). "TVA operates in much the same way as an ordinary business corporation, under the control of its directors in Tennessee, and not under that of a cabinet officer or independent agency headquartered in Washington." NRDC v. TVA, 459 F.2d 255, 257 (2d Cir. 1972).

TVA has used this flexibility and independence to become the largest public power company in the U.S., supplying electricity to more than 9 million customers and generating more than $10.8 billion in annual revenue.[2] In light of the growth of TVA's power business, Congress added Section 15d to the TVA Act in 1959, making all of TVA's power programs entirely self-financed. *See* 16 U.S.C. § 831n-4. Section 15d terms TVA's power program the "Corporation's power business." 16 U.S.C. § 831n-4(t). It also provides that TVA may issue bonds to finance its power programs, which are not obligations of, or guaranteed by, the United States. *See* 16 U.S.C. § 83ln-4(b).

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[1] Tennessee Elec. Power Co. v. TVA, 21 F. Supp. 947, 959 (E.D. Tenn. 1938), *aff'd on other grounds*, 306 U.S. 118 (1939) (upholding TVA project as "reasonably adapted to use for combined flood control, navigation, power and national defense, and that in actual operation the creation of energy is subordinated to the needs of navigation and flood control.").

[2] *See* TVA 2015 Annual Report, at 8, available at https://www.snl.com/Cache/1001205059.PDF?Y=&O=PDF&D=&FID=1001205059&T=&IID=4063363.

TVA is authorized to charge rates for power that will satisfy the foregoing demands and "such additional margin as the Board may consider desirable." 16 U.S.C. § 831n-4(f). TVA has broad latitude in setting rates, the only restriction being that it give "due regard" to the objective that power be sold at rates "as low as are feasible." Id. TVA has also successfully argued that it has unfettered discretion to set rates for electric power[3] and that it is not part of the Executive Branch. In TVA v. EPA, 278 F.3d 1184 (11th Cir. 2002), TVA, using private attorneys, filed suit against the Environmental Protection Agency to avoid compliance with an air pollution control order and vigorously argued that the case presented a valid controversy under Article III due to its separation from the Executive Branch. The Eleventh Circuit agreed and said:

> From its inception, TVA has enjoyed an independence possessed by perhaps no other federal agency... TVA's independence is underscored by its corporate form, its maintenance of a separate legal staff, its removal from centralized control in Washington, its discretionary ratemaking authority, and its exemption from at least 16 provisions of the Administrative Procedures Act.

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[3] *See* Consolidated Aluminum Com. v. TVA, 462 F. Supp. 464, 474 (M.D. Tenn. 1978) (setting of rates is committed to TVA and is not subject to judicial review); Mobil Oil Corp. v. TVA, 387 F. Supp. 498, 506-07 (N.D. Ala. 1974) (same).

TVA v. EPA, 278 F.3d 1184, 1192 (11th Cir. 2002). In opposing *certiorari*, TVA argued that Congress made it independent of centralized federal control so that TVA can function much like a private business corporation.[4] The Supreme Court denied certiorari.[5] As a result of this independence and minimal federal oversight, TVA's power generating activities are not considered a government function and are not protected by discretionary immunity.

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[4] "[T]he Eleventh Circuit thoroughly considered and rejected that contention [that TVA and EPA are a "single entity"], holding that 'TVA possesses unique independence as a federal agency.' This is clearly correct. Congress indicated in the Conference Report on the TVA Act that '[w]e intend that the corporation shall have much of the essential freedom and elasticity of a private business corporation.' The TVA Act confirms this, providing, among other things, that TVA is run by a Board of Directors [which are not appointed by the president], that TVA's employees are not subject to the federal Civil Service laws, that TVA's purchasing activities are independent of general federal procurement laws, and that TVA's financing bonds are not obligations of the United States...Indeed, TVA currently receives no congressional appropriations for its activities. Congress has repeatedly acknowledged TVA's unique nature, for example by precluding suit in the Court of Federal Claims against TVA, and exempting TVA from the Federal Tort Claims Act. And this Court has recognized that TVA 'is a corporate entity, separate and distinct from the Federal Government itself.' Pierce v. United States, 314 U.S. 306, 310 (1941)." Brief of TVA in Opp. to Pet. For Writ of Cert., 2004 WL 716605, at 14-15, TVA v. EPA, (No. 03-1162); *see also* Id. at 14, n.10 (listing additional hallmarks of independence from federal government).

[5] *See* Leavitt v. TVA, 541 U.S. 1030 (2004).

ARGUMENT

I. TVA'S "SUE AND BE SUED" CLAUSE CONSTITUTES A BROAD WAIVER OF SOVEREIGN IMMUNITY.

"[T]he United States, as sovereign, is immune from suit save as it consents to be sued... and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit... A waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed." U.S. v. Mitchell, 445 U.S. 535, 539 (1980). However, TVA is not the "United States" because Congress expressly provided that TVA "May sue and be sued in its corporate name." *See* 16 U.S.C. § 831c(b). Courts have consistently held that TVA does not benefit from sovereign immunity because of the "Sue and be Sued" clause.[6]

However, the courts have held the broad waiver of sovereign immunity of "Sue and Be Sued" clauses is subject to certain exceptions, such as when the entity is engaged in certain governmental functions.[7] This governmental function immunity

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[6] *See* United States v. Smith, 499 U.S. 160, 168-69 (1991)("Courts have read this 'sue or be sued' clause as making the TVA liable to suit in tort, subject to certain exceptions"); Peoples Nat'l Bank of Huntsville v. Meredith, 812 F.2d 682, 684 (11th Cir. 1987)("doctrine of sovereign immunity does not bar suit against TVA"); Stevens v. TVA, 712 F.2d 1047, 1051 (6th Cir. 1983)("The plain implication is that Congress intended that, for ordinary purposes of litigation, suits against the TVA are not suits against the United States."); Queen v. TVA, 689 F.2d 80, 85 (6th Cir. 1982)("this [sue and be sued] language was intended to be a broad waiver of sovereign immunity").

[7] *See* Peoples National Bank of Huntsville, Alabama v. Meredith, 812 F.2d 682, 684-85 (11th Cir. 1987).

exception is limited to situations arising out of the exercise of wholly governmental functions, where the entity acts solely as the government's agent and where the U.S. itself would not be liable, and includes when the subject governmental function is discretionary.[8] The Supreme Court has repeatedly held that when Congress launches a federal entity into the commercial world and endows it with a "Sue and be Sued" clause, the federal entity has no immunity and is no less amenable to judicial process than a private enterprise under like circumstances would be unless it can make a "clear showing" that "an implied restriction of the general authority is necessary to avoid grave interference with the performance of a ***governmental function*** (emphasis added)." FHA v. Burr, 309 U.S. 242, 245 (1940).[9]

TVA cannot satisfy either prong of the controlling test requiring a governmental function and a grave interference. TVA's electric power functions are a commercial function, and immunity is not necessary to avoid a grave interference with

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[8] *See* Edwards v. Tennessee Valley Authority, 255 F.3d 318, 322 (6th Cir. 2001); Peoples, 812 F.2d at 685.

[9] *See also* FDIC v. Meyer, 510 U.S. 471 480 (1994)(same); Loeffler v. Frank, 486 U.S. 549, 554 (1988)(same); Franchise Tax Bd. of Cal. v. United States Postal Serv., 467 U.S. 512,520 (1984) ("[U]nder Burr not only must we liberally construe the sue-and-be-sued clause, but also we must presume that the [federal entity's] liability is the same as that of any other business."); Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381, 391-92 (1939)(the Court rejected immunity for a federal corporation in a tort case and expressly noted that TVA and other federal corporations lack immunity because of their sue and be sued clauses).

TVA's electric power functions. As such, TVA has no discretionary immunity for its commercial actions and actions resulting therefrom, and discretionary immunity analysis is simply not at issue.

A. TVA's Generation, Transmission, and Sale of Electric Power Constitute a Commercial, Not a Governmental, Function.

Consistent with the controlling test requiring TVA to establish a governmental function to be immune, an unbroken chain of case law extending back over 60 years separates TVA's commercial power generating functions from its governmental functions, such as navigation, flood control, fertilizer development, administration of government loans and dissemination of public information. The seminal case distinguishing these two functions is Grant v. TVA, 49 F. Supp. 564 (E.D. Tenn. 1942). In Grant, a farmer sued TVA for flood damage to his crops allegedly caused by TVA's dams and navigation improvements. The court distinguished the two sets of functions:

> By a long line of cases it has definitely been settled that neither the government nor its instrumentalities would have to respond in damages arising in the development and maintenance of waters for purposes of navigation and flood control, including claims for negligence. It may be noted that this position is not because of governmental immunity from suit but on the grounds of public policy... But

> the functions of the defendant in the commercial field are entirely different. Upon principle and authority, it is quite clear that the government should respond in damages for wrongs committed when it is engaged in the same activities as its citizens. It is my judgment that Congress intended that the defendant can be sued for all wrongs committed for conduct pertaining to its generating, use and sale of electric energy made from the power created by its dams.

Id. at 566. Since Grant, the courts have consistently observed this fundamental distinction between TVA's activities relating to electricity generation, such as transmission and sale, and its government functions, such as navigation and flood control, in holding that TVA has no immunity for actions related to its power production programs.[10] The

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[10] *See* Adams v. TVA, 254 F. Supp. 78, 80 (E.D. Tenn. 1965)(a homeowner sued TVA for damages to his house from TVA's blasting activities for the construction of a fossil fuel fired power plant. The court held TVA to have no immunity and said, "The case at bar is much stronger than the Grant case in that the injuries complained of resulted from excavating for the foundations for a steam plant which had no connections with navigation or flood control."); Latch v. TVA, 312 F. Supp. 1069, 1072 (N.D. Miss. 1970)(a **wrongful death action against TVA for an electrocution from its power lines,** the court drew a line between TVA's "non-governmental acts relating to the distribution and sale of electric power," and its "far-ranging governmental activities in the fields of national defense, navigation and flood control" and held there to be jurisdiction over the complaint.); Brewer v. Sheco Construction Co., 327 F. Supp. 1017, 1019 (W.D. Ky. 1971)(TVA was not immune from strict liability for its blasting activities because the "alleged

distinction was succinctly stated by the Second Circuit in Connecticut v. Am. Elec. Power Co., 582 F.3d 309 (2nd Cir. 2009) when the court was faced with a nuisance action against TVA for the emissions of its power plants. The Second Circuit stated:

> While Congress "endowed TVA with some features governmental in nature, [it] deprived it the benefit of others. One of the governmental features specifically denied to TVA was the right to sovereign immunity, which Congress withheld by virtue of the TVA Act's 'sue-and-be-sued' clause. 16 U.S.C. § 831c(b)." North Carolina ex rel. Cooper v. Tenn. Valley Auth., 439 F. Supp. 2d 486, 490 (W.D.N.C. 2006). In Grant v. Tennessee Valley Authority, 49 F. Supp. 564 (E.D. Tenn. 1942), the district court distinguished between TVA's governmental and commercial activities, finding immunity in the former case and liability in the latter case. Liability was premised on the government "respond[ing] in damages for wrongs committed when it is engaged in the same activities as its

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injuries are the result of the TVA's **construction of a new power substation** which is related to the T.V.A.'s use and sale of electrical energy (emphasis added)."); Smith v. TVA, 436 F. Supp. 151, 153-54, (E.D. Tenn. 1977)(the court held that TVA was not immune from a suit sounding in strict liability and trespass for property damage caused by TVA's blasting activities in connection with an electric generating facility even though the facility was appurtenant to a dam.).

citizens," which included "all wrongs committed for conduct pertaining to its generating, use and sale of electric energy made from the power created by its dams." Id. at 566. Over the years, courts have continued to draw a distinction between TVA's performance of government functions, such as flood control, where it is immune from suit, *see* Edwards v. Tennessee Valley Authority, 255 F.3d 318, 322 (6th Cir. 2001); Peoples National Bank of Huntsville v. Meredith, 812 F.2d 682, 685 (11th Cir. 1987); Queen v. Tennessee Valley Authority, 689 F.2d 80, 85-86 (6th Cir. 1982), and its commercial or non-governmental functions, where it has no immunity, *see* Latch v. Tennessee Valley Authority, 312 F. Supp. 1069, 1072 (N.D. Miss. 1970); Adams v. Tennessee Valley Authority, 254 F. Supp. 78, 80 (E.D. Tenn. 1966)...

The discretionary function exception "insulates the Government from liability if the action challenged . . . involves the permissible exercise of policy judgment." Berkovitz v. United States, 486 U.S. 531, 537, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988). TVA contends that because it is an executive agency with governmental status, the sue-and-be-sued clause in the TVA Enabling Act does not apply to it when it engages in the government functions

of its power program. Plaintiffs respond that the discretionary function exception only applies to the federal government and agencies that engage in governmental functions. They further respond that if the function is non-governmental (e.g., commercial), even if performed by a federal agency, then the exception does not apply. Because TVA's electricity generating activities are commercial functions, Plaintiffs argue that TVA has no immunity from suit with respect to those activities.

Sue-and-be-sued clauses "have long been recognized as broad waivers of sovereign immunity and the 'sue-and-be-sued' clause was specifically intended to be a broad waiver when included in the TVA Act." North Carolina, 439 F. Supp. 2d at 490 (citing cases). Accordingly, "there is certainly no indication that Congress included or intended to include any express 'discretionary function' exemption in the TVA Act." Id. Even so, Congress has, in limited circumstances, recognized that broad waivers of immunity may be circumscribed. In order to determine whether this kind of implied limitation on immunity pertains here, we apply the test to which the Supreme Court refers in Loeffler v. Frank, 486 U.S. 549, 108 S. Ct. 1965, 100 L. Ed. 2d 549 (1988):

> "[W]hen Congress establishes [a sue and be sued] agency, authorizes it to engage in commercial and business transactions with the public, and permits it to 'sue and be sued,' it cannot be lightly assumed that restrictions on that authority are to be implied. Rather if the general authority to 'sue and be sued' is to be delimited by implied exceptions, it must be clearly shown that [(1)] certain types of suits are not consistent with the statutory or constitutional scheme, [(2)] that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or [(3)] that for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense. In the absence of such showing, it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue or be sued,' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be. Id. at 554-55.

Connecticut v. Am. Elec. Power Co., 582 F.3d 309 (2d Cir. 2009), *rev'd in part on other grounds*, Am. Elec. Power Co. v. Connecticut, 564 U.S. 410 (2011). The Second Circuit expressly held that torts committed incident to TVA's power generating activities are not

a governmental function and not protected by the discretionary immunity exception.

The cases holding TVA to be immune, by contrast, deal with government functions such as flood control, navigation improvement, fertilizer development, administration of government loans, and dissemination of public information.[11] The cases cited by TVA likewise deal with immunity for TVA's governmental functions. In Johns v. Pettibone Corp., 843 F.2d 464 (11th Cir. 1988), TVA was not liable for the torts of an independent contractor to which it delegated safety. Thus, neither TVA nor its employees were responsible for the actual injury. In North Alabama Electric Cooperative v. TVA, 862 F. Supp. 2d 1291 (N.D. Ala. 2012), TVA was immune from suit on a fraud and implied contract claim when a company relied on the statements of a person

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[11] *See* Edwards v. TVA, 255 F.3d 318, 322 (6th Cir. 2001)("One of TVA's functions as an instrumentality of the United States is the maintenance of an integrated system of multipurpose dams"); Meredith, 812 F.2d at 685 (government loan program to fisherman administered by TVA was a governmental function); Queen, 689 F.2d at 85 ("in certain limited situations the TVA is exempt from liability arising out of the exercise of certain wholly governmental functions, where the TVA acts solely as the Government's agent and where the United States itself would not be liable" - dissemination of public information regarding energy conservation held to be a governmental function immune from defamation action); In re Agric. Bus. Co., Inc., 613 F.2d 783 (10th Cir. 1980) ("the TVA fertilizer program is governmental in nature, and not industrial or commercial in character"); Lynn v. United States, 110 F.2d 586, 590 (5th Cir. 1940) (as agency of the United States "[i]n the erection of dams," TVA not liable for consequences of manipulating waters under its control); Morris v. TVA, 345 F. Supp. 321 (N.D. Ala. 1972) (same); Atchley v. TVA, 69 F. Supp. 952 (N.D. Ala. 1947) (same).

who was not even a TVA agent. In Dickerson v. TVA, No. CV94-B-1031-NW, Mem. Op. at 10 n.6 (N.D. Ala. Jan. 31, 1995), immunity was predicated on the conditions of a roadway on the Wheeler Dam, a government function related to navigation.[12] In Hill v. TVA, 842 F. Supp. 1413 (N.D. Ala. 1993), TVA was immune from a defamation suit by a terminated employee under the express discretionary immunity provisions of the Federal Employees Liability Reform and Tort Compensation Act. In Atchley v. TVA, 69 F. Supp. 952 (N.D. Ala. 1947), the governmental functions of navigation and flood control precluded a suit for the alleged destruction of crops caused by a flood.

The only case cited by TVA which is directly related to TVA's commercial functions is Bobo v. AGCO Corp., 981 F. Supp. 2d 1130, 1145 (N.D. Ala. 2013). In Bobo, a woman sued TVA and alleged she developed mesothelioma as a result of being wrongfully exposed to asbestos for more than 22 years from laundering the asbestos-laden work clothes worn by her husband, who worked in a TVA nuclear plant. While the court precluded her failure to warn claim based on discretionary immunity, TVA was still liable to her under a normal negligence claim. The Court upheld the jury's verdict and found 1) TVA owed a duty of reasonable care to the wife and others like her; 2) TVA breached its duty of care

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[12] *See also* Edwards v. TVA, 255 F.3d 318, 322 (6th Cir. 2001)(Decedent drowned when he slipped from the rocky shoreline appurtenant to a dam which was maintained and operated by TVA. TVA was immune due to discretionary decisions related to the safety of a dam, a wholly governmental function.)

to the wife by failing to implement reasonable and minimally expensive safety procedures that would have prevented her exposure from her husband's work clothes; 3) Causation; and 4) TVA was not shielded from liability by discretionary function doctrine. *See* Bobo v. TVA, 2015 U.S. Dist. LEXIS 130741 (N.D. Ala. 2015). Further, it is important to note that the actual injury to the wife was not directly tied to TVA's power production activities - the activities themselves did not cause the injury.

As here, TVA's actions were not related to any governmental function. TVA was acting solely in its commercial capacity when it created a hazardous situation that caused Mr. Thacker's injuries and damages. Further, TVA's actions in attempting to warn the public of the hazardous situation it created is not "navigation" under 16 U.S.C. § 831 because "navigation" is the construction of dams and maintenance of rivers and tributaries for the flow of commerce and flood control. TVA cannot establish that its generation of electric power is a governmental function and thus cannot overcome the presumption that Congress waived its immunity in the "Sue and be Sued" clause. Where, as here, Congress has given a federal corporation "the status of a private commercial enterprise," Congress has "cast off" the "cloak of sovereignty" and permitted the entity to sue and be sued like any other commercial enterprise. Loeffler, 486 U.S. at 556. TVA's electricity generation activities, and activities performed as a consequence thereof, constitute a "suable" commercial function.

B. An Implied Restriction of TVA's General Authority to be Sued Is Not "Necessary to Avoid a Grave Interference" with its Electric Power Functions and actions resulting therefrom.

TVA also cannot demonstrate that imposing liability here would "gravely interfere" with its electric power functions. Not only does TVA not allege such in its motion, but any such allegation would be tantamount to TVA saying, "We cannot perform our power generating activities if we have to do them in such a way as to not injure third parties." Public policy cannot stand for such a position. In Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 392 (2nd Cir. 2009), the Second Circuit found that TVA had "available to them practical, feasible and economically viable options for reducing carbon dioxide emissions without significantly increasing the cost of electricity to their customers" and no grave interference existed. Here, TVA had a practical and feasible alternative - it could have safely installed the power lines overhead and then taken reasonable steps in warning the public of the hazardous situation which it created. TVA and its employees failed to undertake certain actions which a reasonable person in like circumstances would have taken.

C. Congress Did Not Intend TVA's "Sue and be Sued" Clause to be Used in a Narrow Sense.

The absence of any codified TVA immunity and statutory construction show a plain purpose of

Congress that the TVA Act's "Sue and be Sued" clause be used in a broad sense.

1. TVA is Expressly Precluded from Immunity in the Federal Tort Claims Act.

Absent an express statute governing a lawsuit against the U.S., one of its agencies or instrumentalities, or one of its employees, suits against a government employee are generally only permitted under the Federal Tort Claims Act ("FTCA"). *See* 28 U.S.C. § 1346(b)(l). Any employee who may be subject to a claim under 28 U.S.C. § 1346(b)(l) is immune under the "discretionary function exception" of 28 U.S.C. § 2680.[13] However, the FTCA expressly states that it shall not apply to "Any claim arising from the activities of the Tennessee Valley Authority." *See* 28 U.S.C. § 2680(1). Thus, the discretionary immunity under § 2680(a) simply does not apply to TVA, as is consistently held by the courts.[14]

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[13] "The provisions of this chapter [28 U.S.C. § 2671 et seq.] and section 1346(b) of this title [28 U.S.C. § 1346(b)] shall not apply to [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

[14] *See* Mays v. TVA, 699 F. Supp. 2d 991, 1006 (E.D. Tenn. 2010)("TVA does not benefit from the discretionary function doctrine as it is embodied in the [FTCA]); North Carolina ex rel. Cooper v. Tennessee Valley Authority, 515 F.3d 344, 349 (4th Cir. 2008) (*quoting* 79 Cong. Reg. 6563-64

2. Since TVA May Sue and be Sued in Its Own Name, It Is Not Entitled to Any Immunity of the United States.

Further, and as discussed above, TVA is not the United States. TVA cannot avail itself of the immunity of the United States because it is a federally-chartered corporation.[15] In fact, as a litigant, TVA routinely takes positions adverse to the U.S.[16] and the only time TVA sues in the name of the U.S. is when it condemns real property or conveys

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(1946)(statement of Sen. Hill) "Congress expressly exempted TVA from the FTCA and its discretionary immunity exception because it intended that legal claims be exercised against the TVA exactly as they could have been exercised against private utility companies."); (Latch v. TVA, 312 F. Supp. 1069, 1072 (N.D. Miss. 1970)(cases dealing with "TVA's activities in the distribution and sale of electric power" involve "a determination of tort liability, quite apart from the scope of the Federal Tort Claims Act, including its exceptions."); Smith v. TVA, 436 F. Supp. at 154 n.3 ("the court fails to see how the TVA can avoid liability on the basis of a construction of a statute which is expressly not applicable to it."); Atchley, 69 F. Supp. at 956 n.4 ("TVA was exempted from the provisions of the [FTCA] at its own request on the ground that it was already subject to suit and certain of the procedural aspects of the Act would be burdensome. The Act was passed after the decision in the Grant case and it must be presumed that TVA sought and Congress granted the exemption with that case in mind.").

[15] *See* Pierce v. United States, 314 U.S. 306, 310 (1941)("TVA, although an instrumentality of the Federal Government, is a corporate entity, separate and distinct from the Federal Government itself."); Stevens v. TVA, 712 F.2d 1047, 1051 (6th Cir. 1983) ("suits against the TVA are not suits against the United States.").

[16] *See* TVA v. EPA, 278 F.3d 1184 (11th Cir. 2002); Big Rivers Elec. Corp. v. EPA, 523 F.2d 16 (6th Cir. 1975); TVA v. United States, 13 Cl. Ct. 692 (Cl. Ct. 1987); TVA v. United States, 96 F. Supp. 409 (N.D. Ala. 1951).

real property for certain purposes.[17] "From its inception, TVA has enjoyed an independence possessed by perhaps no other federal agency. TVA's independence is underscored by its corporate form, its maintenance of a separate legal staff, its removal from centralized control in Washington, its discretionary ratemaking authority, and its exemption from at least 16 provisions of the Administrative Procedures Act." TVA v. EPA, 278 F.3d 1184, 1192 (11th Cir. 2002). "The TVA is run by a Board of Directors, TVA's employees are not subject to the federal Civil Service laws, the TVA's purchasing activities are independent of general federal procurement laws, the TVA's financing bonds are not obligations of the U.S, and the TVA currently receives no congressional appropriations for its activities. Congress has repeatedly acknowledged the TVA's unique nature by, for example, precluding suit in the Court of Federal Claims against TVA, and exempting the TVA from the FTCA. The TVA is a corporate entity, separate and distinct from the Federal Government itself." Pierce v. U.S., 314 U.S. 306, 310 (1941). Since TVA is not the United States, it does not benefit from any immunity that only inures to the United States.

Further, as a maritime law may be in issue in this case, and since the TVA may be sued in its own corporate name, it is not subject to the Public Vessels Act[18] or the Admiralty Jurisdiction Extension Act[19] because those sections only apply to

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[17] *See* 16 U.S.C. §§ 831c(h), (k); United States ex rel. TVA v. Welsh, 327 U.S. 546 (1946).

[18] 46 U.S.C. § 31101.

[19] 46 U.S.C. § 30101.

actions against the U.S. TVA is also not subject to the Suits in Admiralty Act[20] because that section only applies when the judgment would have to be paid directly or indirectly out of the U.S. treasury, or where the U.S. is a party.[21] The vast majority of TVA revenues are kept by the TVA to support its further corporate enterprises, and it is only required to pay a portion of its revenues to the U.S. Treasury In fact, in eminent domain actions, TVA purchases land with its own funds, and not with funds of the U.S. Treasury. Thus, any judgment against the TVA is not paid out of U.S. Treasury funds.

II. SINCE TVA'S COMMERCIAL ACTIVITIES ARE NOT IMMUNE, GAUBERT ANALYSIS DOES NOT APPLY.

TVA asserts that its actions on the day in question should be analyzed under the two part test for the discretionary function exception in United States v. Gaubert, 499 U.S. 315, 324-25 (1991). However, as discussed above, the issue here is not whether the action was mandatory, discretionary, or susceptible to policy analysis. The Gaubert test only applies to government employees; it does not apply to the actions of a federally chartered corporation which is performing non-governmental activities. Here, the issue is to be determined by the test in Loeffler v. Frank, 486 U.S. 549 (1988):

> [W]hen Congress establishes [a sue and be sued] agency, authorizes it to engage in commercial and business

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[20] 46 U.S.C. § 30901.

[21] *See* Johnson v. U.S. Shipping Board Emergency Fleet Corp., 280 U.S. 320, 326 (1930).

> transactions with the public, and permits it to 'sue and be sued,' it cannot be lightly assumed that restrictions on that authority are to be implied. Rather if the general authority to 'sue and be sued' is to be delimited by implied exceptions, it must be clearly shown that [(1)] certain types of suits are not consistent with the statutory or constitutional scheme, [(2)] that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or [(3)] that for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense. In the absence of such showing, it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue or be sued,' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be.

Id. at 554-55.

As Congressional intent and applicable case law clearly show, the conduct by TVA in this case was: 1) Entirely commercial and appurtenant to those commercial activities; 2) Not inconsistent with any statutory scheme; 3) Is not necessary to avoid grave interference with the performance of a governmental function; and 4) the "Sue and be Sued" clause is not to be used in a narrow sense, as

evidenced by TVA's exclusion from multiple immunity statutes and status as a unique and independent entity separate from the U.S. Therefore, Gaubert has no bearing on the issues before this Court.

III. TVA IS NOT PROTECTED BY DISCRETIONARY IMMUNITY BECAUSE ITS ACTIONS WERE NOT DISCRETIONARY.

Even if, *arguendo,* TVA may assert discretionary immunity for its wholly commercial actions in this case, those actions are not protected by the discretionary immunity exception because the failure to exercise reasonable care in the assembly and installation of the power lines across the Tennessee River contained no discretion whatsoever. The Supreme Court's decision in United States v. Gaubert, 499 U.S. 315 (1991) established a two-part test for determining whether challenged governmental conduct falls within the scope of the discretionary function exception, and insulates the governmental agency from liability. The Eleventh Circuit has described the two prongs of the Gaubert Test as follows:

> We must first determine whether the challenged act or omission violated a mandatory regulation or policy that allowed no judgment or choice. United States v. Gaubert, 499 U.S. 315 (1991). "The requirement of judgment or choice is not satisfied if a 'federal statute, regulation, or policy specifically prescribes a course of action for an

> employee to follow, because 'the employee had no rightful option but to adhere to the directive.'" Id. at 322, (*quoting* Berkovitz v. United States, 486 U.S. 531, 536 (1988)). [E]ven assuming the challenged conduct involves an element of judgment, however, we then must determine if the challenged actions are the kind of conduct "that the discretionary function exception was designed to shield." Id. (*quoting* Berkovitz, 486 U.S. at 536); *see also* Phillips v. United States, 956 F.2d 1071, 1075 (11th Cir. 1992). The conduct must be "grounded in the policy of the regulatory regime." Gaubert, 499 U.S. at 325. In Gaubert, the Court discussed the type of conduct that would be considered grounded in judgment or choice but not in developing or carrying out public policy. If a governmental official drove an automobile on a mission connected with his official duties and negligently collided with another car, the exception would not apply. Although driving requires the constant exercise of discretion, the official's decision in exercising that discretion can hardly be said to be grounded in regulatory policy. Id. at 325 n. 7.

Autery v. United States, 992 F.2d 1523, 1526-27 (11th Cir. 1993). TVA makes a factual attack on the existence of subject matter jurisdiction and claims Plaintiffs can assert no set of facts which would

overcome TVA's discretionary function immunity. While the Thackers dispute that TVA has any such immunity for its actions in this case, discretionary immunity does not inure to TVA because its negligent and/or wanton installation of the power lines contained no discretion.

TVA states Plaintiffs have asserted six (6) different types of conduct which are being complained of herein and that all such allegations are protected by discretionary immunity. *See* Doc. 12, at p. 4. However, TVA skips over the averments in the Complaint wherein Plaintiffs allege, "TVA owed a duty to exercise reasonable care in the assembly and installation of the power lines across the Tennessee River." *See* Compl., Doc. 124 and 28. The choice to install the power lines may have been discretionary, but the actual installation of those power lines contained no discretion. In Bobo v. AGCO Corp., 981 F. Supp. 2d 1130, 1145 (N.D. Ala. 2013) and Bobo v. TVA, 2015 U.S. Dist. LEXIS 130741 (N.D. Ala. 2015), TVA was protected by discretionary immunity for its choice in not warning the spouse of its employee about possible asbestos exposure, but it was liable for actually exposing her because those actions contained no discretion. Here, no discretion was involved in the installation of the power lines, and TVA is not protected for those actions by any discretionary immunity.

TVA also asserts that its actions in warning boaters are also protected by discretionary immunity. In support of that averment, TVA makes bare allegations that it is unaware of any mandatory Federal statute, regulation, or policy governing its conduct and provides the affidavit of one of its

employees. The determination of whether those actions were mandatory, discretionary, or are of a type that should be protected by any alleged immunity must be made, and neither the Thackers nor this Honorable Court have had an opportunity to conduct any fact analysis because no discovery has yet been performed. All that is before this Court at this time is the bare allegations of TVA and the affidavit of a single employee. Plaintiffs should be allowed to conduct discovery with TVA to determine whether TVA's actions after it created the hazardous situation may have been mandatory under a Federal statute, regulation, or policy, especially considering TVA formerly had a large patrol division which was charged with patrolling boat traffic on the Tennessee River. A policy governing the actions of that patrol division may have still been in effect on the day in question and may have required certain actions by TVA employees.

In either event, TVA's actions in not exercising reasonable care in installing the power lines was a direct and proximate cause of Plaintiffs' injuries and damages and is not protected by any discretionary immunity. This Honorable Court undoubtedly has subject matter jurisdiction over Plaintiffs' claims.

CONCLUSION

The TVA Act's "Sue and be Sued" clause constitutes a broad waiver of sovereign immunity. Discretionary immunity only applies to governmental functions, and TVA's power generating activities are not a governmental function. TVA's actions which caused Plaintiffs'

injuries and damages were solely commercial functions, which are not protected by sovereign immunity. Even if TVA's actions were governmental, they are not protected by the discretionary exception because no discretion was involved. Therefore, this Honorable Court has subject matter jurisdiction and TVA's Motion to Dismiss should be denied.

PLAINTIFFS RESPECTFULLY REQUEST ORAL ARGUMENT.

Respectfully submitted, this the 29th day of March, 2016.

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CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically through the Court's ECF system on the date shown in the document's ECF footer. Notice of this filing will be sent by operation of the Court's ECF system to counsel for all other parties as indicated on the electronic filing receipt and listed below. Parties may access this filing through the Court's ECF system.

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[ENTERED: April 1, 2016]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

GARY THACKER, ET UX.,

Plaintiffs,

v. No. 5:15-cv-01232-AKK

TENNESSEE VALLEY AUTHORITY,

Defendant.

REPLY BRIEF IN FURTHER SUPPORT OF TVA'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION BASED ON THE DISCRETIONARY FUNCTION EXCEPTION

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INTRODUCTION

TVA has moved the Court to dismiss this action for lack of subject matter jurisdiction based on the discretionary function exception. (Doc. 11.) Plaintiffs' brief in opposition (Doc. 17) argues (1) that the TVA Act's sue-and-be-sued clause is a total waiver of sovereign immunity precluding application of the discretionary function exception to TVA; (2) that the discretionary function exception is not applicable because TVA's power program activities are "commercial"; and (3) that TVA's alleged conduct

was not discretionary. The first two arguments are contrary to Eleventh Circuit precedent and recent rulings of this Court, and the third argument is unavailing because Plaintiffs have not identified any mandatory directive that dictated a specific course of conduct allegedly violated by TVA.

ARGUMENT

I. The TVA Act's Waiver of Sovereign Immunity Does Not Negate TVA's Entitlement to the Discretionary Function Exception.

Plaintiffs cite *FHA v. Burr*, 309 U.S. 242, 245 (1940); *Loeffler v. Frank*, 486 U.S. 549, 556 (1988), and *FDIC v. Meyer*, 510 U.S. 471, 480 (1994), to suggest that TVA's sue-and-be-sued clause makes TVA's legal liability identical to that of private entities unless TVA "can make a 'clear showing' that 'an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function." (Doc. 17 at 7.) Plaintiffs are wrong for the reasons raised in TVA's initial brief (Doc. 12 at 6-9), and because Plaintiffs' arguments conflict with controlling Supreme Court and Eleventh Circuit authority.

In *Peoples National Bank of Huntsville, Ala. v. Meredith*, 812 F.2d 682, 684-85 (11th Cir. 1987), the Eleventh Circuit recognized that TVA's sue-and-be-sued clause is a broad waiver of sovereign immunity but nevertheless held that TVA cannot be held liable "when the subject governmental function is discretionary":

> First, we note that the doctrine of sovereign immunity does not bar suit against TVA; indeed, its enabling act provides that it "[m]ay sue and be sued in its corporate name." 16 U.S.C. § 831(c)(b). Nevertheless, courts have held that TVA cannot be subject to liability when engaged in certain governmental functions. ***Queen*** *v.* ***Tennessee Valley Authority***, 689 F.2d 80, 85 (6th Cir. 1982). This "nonliability" doctrine is applied when the subject governmental function is discretionary. ***Morris*** *v.* ***Tennessee Valley Authority***, 345 F. Supp. 321 (N.D. Ala.1972).

The Eleventh Circuit's holding in *Peoples* is in accord with long-standing principles regarding sue-and-be-sued clauses. Indeed, the law has been settled since ***FHA*** *v.* ***Burr*** that sue-and-be-sued clauses in enabling acts of Federal agencies are presumed to be broad waivers of sovereign immunity which include the appropriate incidents of legal proceedings, except where it appears

> that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the "sue and be sued" clause in a narrow sense.

Burr, 309 U.S. at 245. *Loeffler* and *Meyer*, the Supreme Court cases cited in Plaintiffs' brief, quote this language from *Burr*.

As reflected in the above language from *Burr* and repeated in *Loeffler* and *Meyer*, the scope of a Federal agency's sue-and-be-sued waiver with respect to a specific incident of suit is not a matter susceptible to textual parsing; rather, it is a matter to be resolved by legal policy analysis because "the scope of such a waiver can only be ascertained by reference to underlying congressional policy." *Franchise Tax Bd. v. USPS*, 467 U.S. 512, 521 (1984).

Applying this rationale, *Loeffler* held that the sue-and-be-sued clause in the Postal Service's enabling statute exposed it to awards for prejudgment interest in cases arising under Title VII because such awards are "natural and appropriate incidents" of litigation. 486 U.S. at 555. In *Myers*, the Court held that the FDIC's sue-and-be-sued clause did not bar a potential tort claim for an alleged constitutional violation against the FDIC but nonetheless refused to recognize such a claim against Federal agencies as a matter of policy. 510 U.S. at 480-86.

In contrast to the matters at issue in *Loeffler* and *Myers*, the discretionary function exception arises from constitutional separation of powers principles and is implied even when there is a broad waiver of sovereign immunity. For example, while the Federal Tort Claims Act (FTCA) contains an explicit discretionary function exception, the Supreme Court has recognized that the FTCA's statutory exception merely makes explicit what

otherwise would have been accomplished through judicial construction. The legislative history is clear that the exception was drafted merely as a "clarifying amendment" (*Dalehite v. United States*, 346 U.S. 15, 26 (1953)), because, under constitutional separation of powers principles, it was "believed that claims of the kind embraced by the discretionary function exception would have been exempted from the waiver of sovereign immunity by judicial construction." *United States v. Varig Airlines*, 467 U.S. 797, 810 (1984).

Based on separation of powers principles, the majority of courts, including the Eleventh Circuit, have recognized a discretionary function exception to the broad waiver of sovereign immunity in the Suits in Admiralty Act (SAA) even though there is no express discretionary function exception in the SAA. As stated in *Mid-South Holding Co. v. United States*, 225 F.3d 1201, 1204 (11th Cir. 2000):

> [T]his circuit is among the majority holding that the SAA's waiver of immunity is subject to the discretionary function exception. *See Williams v. United States*, 747 F.2d 700, 700 (11th Cir. 1984), *aff'g and adopting Williams By and Through Sharpley v. United States*, 581 F. Supp. 847 (S.D. Ga. 1983).

In affirming the district court, the Eleventh Circuit pointed out that the SAA was passed after the Government "entered the merchant shipping field" and the purpose was to provide relief to persons injured by wrongful conduct of the Government "when acting as a shipper" (i.e., an

activity with a private ***commercial*** analog). *Id.* at 849-50. Like TVA's sue-and-be-sued clause, the SAA's waiver of immunity is, on its face, without limitation. Thus, the SAA provides for injury and death suits in admiralty "against the United States or a [wholly] federally-owned corporation" in cases "in which, if [the Government] vessel were privately owned or operated . . . a civil action in admiralty could be maintained." 46 U.S.C. § 30903(a). The SAA further provides that "[a] civil action under this chapter ***shall proceed and be heard and determined according to the principles of law . . . applicable in like cases between private parties.***" 46 U.S.C. § 30907.

As noted by the district court in *Williams*, the SAA's waiver language establishes that "Congress intended the new SAA to be a waiver of ***all*** governmental immunity to suits in admiralty." 581 F. Supp. at 851. Nevertheless, the Eleventh Circuit found that separation of powers principles mandate that "the SAA's waiver of immunity is subject to the discretionary function exception." *Mid-South Holding Co.*, 225 F.3d at 1204.

There is no basis for distinguishing between the breadth of the SAA's waiver of immunity and the waiver in the TVA Act's sue-and-be-sued clause; under separation of powers principles, both of those broad waivers are subject to the discretionary function exception. Thus, the decisions of the Eleventh and Sixth Circuits and the decisions of district courts in those circuits holding the discretionary function exception applicable to TVA are based on sound and well- established legal reasoning grounded in separation of powers principles.

II. There is No Commercial Versus Governmental Distinction under Federal Discretionary Function Law.

Plaintiffs next argue that even if the discretionary function exception were applicable to TVA, it is not applicable to challenged conduct involving TVA's power program activities because they are "commercial" rather than "governmental" in nature. (Doc. 17 at 2-3.) Again, Plaintiffs are wrong.

A Federal agency engaged in activities to further Federal goals and purposes pursuant to its enabling statue does not become non-governmental simply because non-governmental entities engage in similar activities for private goals and purposes.[1] Indeed, The Supreme Court consistently has held that, if activities of Federal agencies are statutorily authorized and constitutional, they necessarily are governmental and cannot be parsed into other categories such as proprietary or commercial.[2] And this is true even as to sue-and-be-sued agencies involved in activities which have private commercial

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[1] "The federal government has played an active role in providing electrical energy." *Citizens & Landowners Against the Miles City/New Underwood Powerline v. Sec'y, U.S. Dep't of Energy*, 683 F.2d 1171, 1180 (8th Cir. 1982) ("Federal agencies, such as WAPA, Bonneville Power Administration, [TVA], and others . . . have been created to implement federal policies and programs aimed at producing and transmitting electrical power.")

[2] TVA's construction and operation of power plants is authorized by the TVA Act and is constitutional. *See, e.g., United States ex rel. TVA v. Three Tracts of Land*, 377 F. Supp. 631, 635 (N.D. Ala. 1974) ("It is the Court's opinion that the construction of a nuclear powered steam plant is authorized by the TVA Act and that the authorization is not in violation of the United States Constitution.").

analogs (e.g., lending activities, insurance activities). Further, the Supreme Court specifically has rejected the addition of a "governmental" versus "commercial" component to the two-part test to determine application of the discretionary function doctrine.

In *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947), the Supreme Court squarely rejected the possibility that the liability of a self-sustaining, sue-and-be-sued Federal corporate agency can be governed by a "governmental" versus "commercial" distinction. The Federal Crop Insurance Corporation (FCIC) was created as a sue-and-be-sued corporate agency for the purpose of selling crop insurance on a self-sustaining basis, with any impairment of the Government's initial capitalization of the FCIC to be restored out of operating profits of the FCIC.

The issue in *Merrill* was the FCIC's common law liability based on an insurance contract issued by an agent having apparent but not actual authority. The Idaho Supreme Court affirmed the trial court's judgment against the FCIC, reasoning that since the FCIC was a sue-and-be-sued Federal corporate agency, its liability should be determined as though it were a private commercial insurer subject to the common law doctrine of apparent authority. The United States Supreme Court reversed, holding that the FCIC could ***not*** be held liable just like a private entity in the insurance business:

> [W]e assume that recovery could be had against a private insurance company. But the Corporation is not a private insurance company. ***It is too late in***

> ***the day to urge that the Government is just another private litigant, for purposes of charging it with liability, whenever it takes over a business theretofore conducted by private enterprise or engages in competition with private ventures.*** Government is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it. [332 U.S. at 383-84 (internal footnotes omitted.).]

Supreme Court holdings involving sue-and-be-sued Federal agencies involved in lending activities are in full accord. For example, in *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 477 (1939), the Court stated:

> ***[W]hen the national government lawfully acts through a corporation which it owns and controls, those activities are governmental functions . . . .***

Similarly, in *Pittman v. Home Owners' Loan Corp.*, 308 U.S. 21, 32 (1939), the Court reiterated:

> ***[T]he activities of the Corporation through which the national government lawfully acts must be regarded as governmental functions . . . .***

And in *Fed. Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 102 (1941), the Court again held:

> The argument that the lending functions of the federal land banks are proprietary rather than governmental misconceives the nature of the federal government with respect to every function which it performs. ***The federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental.*** It also follows that when Congress constitutionally creates a corporation through which the federal government lawfully acts, the activities of such corporation are governmental. [Internal citation omitted.]

In *Fed. Land Bank v. Bd. of County Comm'rs*, 368 U.S. 146, 150-51 (1961), the Supreme Court summarized its prior holdings:

> ***Legitimate activities of governments are sometimes classified as "governmental" or "proprietary"; however, our decisions have made it clear that the Federal Government performs no "proprietary" functions. If the enabling Act is constitutional and if the instrumentality's activity is within the authority granted by the Act, a governmental function is being performed***. [Internal footnotes omitted.]

In accord with the above holdings, the Supreme Court specifically has rejected the addition of a "governmental" versus "commercial" component to the two-part test to determine application of the discretionary function exception. In the leading case of *Dalehite v. United States*, 346 U.S. 15 (1953), the alleged Government negligence involved conduct with a common commercial analog—the manufacture and shipping of fertilizer. Nevertheless, the Supreme Court held the discretionary function exception applicable, rejecting a dissent argument that the discretionary function exception should be held inapplicable because the challenged conduct "involved actions akin to those of a private manufacturer, contractor, or shipper." *Id.* at 60.

Subsequent Supreme Court decisions in tort cases have reaffirmed the point. *See Indian Towing Co. v. United States*, 350 U.S. 61, 65 (1955) (refusing to adopt such a distinction because "it would thus push the courts into the 'non- governmental' – 'governmental' quagmire that has long plagued the law of municipal corporations" and declaring the distinction to be "a rule of law that is inherently unsound"); *Varig Airlines*, 467 U.S. at 812 (reaffirming *Indian Towing's* refusal to be drawn into the governmental versus non-governmental "quagmire" for purposes of determining the Government's tort liability).[3]

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[3] Courts have not excluded electric power programs of other Federal agencies from application of the discretionary function exception on a commercial versus governmental theory. Rather, as long as the two-part discretionary function test is satisfied, courts apply the discretionary function exception to challenged conduct involving the power programs

Plaintiffs here ignore this longstanding Supreme Court precedent and, instead rely on decisions from the Fourth Circuit, *North Carolina ex rel. Cooper v. TVA*, 515 F.3d 344 (4th Cir. 2008), and the Second Circuit, *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2nd Cir. 2009), both of which fail to address the Supreme Court's rejection of the artificial "governmental" versus "commercial" distinction. Thus, Plaintiffs' reliance on these decisions is misplaced.

In *North Carolina*, a divided Fourth Circuit panel held that the discretionary function exception was not available to TVA in a tort case involving emissions from certain of the Government's fossil plants entrusted to TVA, stating that "TVA's power-generating activities are commercial in nature and thus are not immune to suit."[4] 515 F.3d 350 n.4. The Fourth Circuit panel majority offered no legal logic

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of other Federal agencies. *E.g., Richardson v. U.S.*, 943 F.2d 1107 (9th Cir. 1991) (discretionary function exception applicable to preclude personal injury claims based on the alleged negligent design of a Bonneville Power Administration electric power transmission line); *Mitchell v. U.S.*,787 F.2d 466 (9th Cir. 1986); *Mellott v. U.S.*, 808 F. Supp. 746 (D. Mont. 1992) (discretionary function exception applicable to preclude a wrongful death claim based on the alleged negligent design of a Western Area Power Administration electric power transmission line).

[4] The dissenting member of that panel would have held the discretionary function exception applicable to TVA. 515 F.3d 354. The *North Carolina* split panel decision on interlocutory appeal did not receive any further review in the Fourth Circuit or the Supreme Court because the case was dismissed on other grounds. *North Carolina v. TVA*, 615 F.3d 291 (4th Cir. 2010).

for ignoring the Supreme Court authorities cited above.[5]

The *North Carolina* holding also is contrary to the Eleventh Circuit's decision in *Johns v. Pettibone Corp.*, 843 F.2d 464 (11th Cir. 1988), where the exception was applied to conduct arising out of TVA's power program activities. *Johns* involved the electrocution death of a contractor employee on the premises of TVA's Widows Creek Fossil Plant. This Court granted summary judgment to the TVA managers named as defendants. The Eleventh Circuit affirmed, holding that "safety decisions [by TVA's coal-fired power plant managers] represent an exercise of discretion giving rise to governmental immunity" and FTCA discretionary function cases were "'appropriate in the context of the TVA defendants.'" *Id.* at 467 n.2 (quoting from and adopting this Court's opinion).

Moreover, the *North Carolina* analysis has been analyzed and rejected by district courts (including this Court) in the Sixth and Eleventh Circuits. In *Mays v. TVA*, 699 F. Supp. 2d 991 (E.D. Tenn. 2010), which involved a large number of tort cases arising from the failure of an ash containment dike at TVA's Kingston Fossil Plant, the court explained:

> The Court respectfully disagrees with Plaintiffs' extension of the holding

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[5] The *Am. Elec. Power* decision also fails to offer any analysis of the controlling Supreme Court authority; instead, it "rel[ies] on the . . . Fourth Circuit's decision[] in *North Carolina*." 582 F.3d 309, 388-89 (2nd Cir. 2009). Therefore, the Second Circuit's decision is not pertinent.

of the Fourth Circuit as it pertains to the facts of these cases, facts involving the failure of a coal ash retainment dike at TVA's KIF plant, a coal-fired electricity plant. As an initial matter, the Court notes that the holding of *North Carolina* is contrary to previous decisions by the Sixth Circuit affirming the application of the discretionary function doctrine to TVA when the challenged conduct relates to the operation of dams, flood control, and electric power production. In addition, this Court will not parse the conduct or activities of TVA into the distinct categories of commercial and governmental conduct because the application of such distinct categories are bound to lead to disparate and inconsistent results. This is especially so when, as here, the challenged conduct and activities are in furtherance of a function that TVA is explicitly authorized to perform by the TVA Act-namely, electric power production and distribution.

. . . Congress made the governmental choice of authorizing TVA to provide communities with various types of electric power. Such conduct in a federally created agency and instrumentality—the exercise of a statutorily authorized purpose—constitutes the exercise of a "governmental function" to which the discretionary function doctrine applies.

> Accordingly, the Court will apply the discretionary function doctrine to TVA and its conduct relating to its power production purpose and function, thus encompassing the challenged conduct in these cases. [*Id.* at 1008-10 (internal citations and footnotes omitted).]

In *Bobo v. AGCO Corp.*, 981 F. Supp. 2d 1130 (N.D. Ala. 2013), which involved bystander asbestos exposure claims by the spouse of a worker at TVA's Browns Ferry Nuclear Plant, this Court similarly rejected the commercial versus governmental distinction as unsound:

> Primarily, the Fourth Circuit's holding in *North Carolina* is contrary to the Eleventh Circuit's binding decision in *Johns v. Pettibone*, which upheld the application of the discretionary function doctrine to TVA's power-production activities — albeit in connection with the operation of a coal-fired power plant, as contrasted to a nuclear facility: a distinction that this court does not believe should work a difference in the decision. Further, as the Eastern District of Tennessee stated in a persuasive opinion [*Mays v. TVA*], this Court will not parse the conduct or activities of TVA into the distinct categories of commercial and governmental conduct because the application of such distinct categories are bound to lead to disparate and inconsistent results. This is especially

> so when, as here, the challenged conduct and activities are in furtherance of a function that TVA is explicitly authorized to perform by the TVA Act — namely, electric power production and distribution.
>
> Thus, because Congress authorized TVA to "produce, distribute, and sell electric power," this court finds that such conduct constitutes a governmental function to which the discretionary function doctrine may apply.

981 F. Supp. 2d at 1146 (internal citations omitted).

Plaintiffs cite five TVA cases in support of their commercial versus governmental assertion (Doc. 17 at 8, 9 n.10), but the actual ***holdings*** of those cases do not support Plaintiffs argument.[6]

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[6] *Grant v. TVA*, 49 F. Supp. 564 (E.D. Tenn. 1942), involved crop damage caused by flood waters and the third claim of the complaint alleged the flooding resulted from TVA's accumulation of waters to generate electricity. The court held that "***assuming*** that there is a right to sue on the third claim because it concerns the defendant's commercial activities, it is my judgment that [TVA's] motion for summary judgment on this claim should be sustained. . . . [T]here is no material evidence to be submitted to a jury on the third claim." *Id.* at 566. Further, *Grant* was decided prior to the Supreme Court's decision in *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947), which rejects the illogic of the *Grant* dicta.

Smith v. TVA, 436 F. Supp. 151 (E.D. Tenn. 1977), involved blasting damages resulting from construction of a hydroelectric generating plant. The court held that plaintiff's strict liability and continuing trespass counts were

In contrast, many courts in cases arising out of TVA's power program activities have stated that TVA is wholly governmental in nature. *See, e.g.*,

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maintainable (since TVA is subject to suit), but that plaintiff's nuisance count was not: "Since the TVA project here involved is being constructed under legislative authority, the construction of the project would not constitute a nuisance. Therefore, the continuing nuisance count will be dismissed." *Id.* at 154.

Brewer v. Sheco Constr. Co., 327 F. Supp. 1017 (W.D. Ky. 1971), involved blasting damages resulting from electrical substation construction. ***The court stated that "[e]ven though several cases attempt to distinguish between governmental and proprietary type functions, this court believes that it is not necessary to define such a dichotomy*** in this case, but only necessary to state that the T.V.A. is not immune from a suit of this nature [strict liability], nor is such a suit contrary to public policy." *Id.* at 1019 (internal citation omitted). The case did not involve the discretionary function exception.

Latch v. TVA, 312 F. Supp. 1069 (N.D. Miss. 1970), was an electrocution case in which the issue was the proper basis of jurisdiction. In the process of finding jurisdiction, the court stated that TVA's sue-and-be-sued clause "relinquished any sovereign immunity which TVA might have had as a government agency or corporation for proprietary functions . . . ." *Id.* at 1072. *Latch* did not consider whether the discretionary function exception might be applicable; it simply stands for the point that TVA is amenable to suit in tort.

Adams v. TVA, 254 F. Supp. 78 (E.D. Tenn. 1966), involved blasting damages resulting from steam plant construction. This Court did ***not*** hold that the discretionary function exception was inapplicable because power program activities were involved; rather, ***the Court considered*** the discretionary function exception on its merits and held that "the determination as to the amount of explosives to use in the excavations for the Bull Run plant was not the kind of judgment protected by *Dalehite v. United States*." *Id.* at 80.

Quality Tech. Co. v. Stone & Webster Eng'g, 745 F. Supp. 1331, 1339 (E.D. Tenn. 1989) ("As has been declared by many courts, the TVA is a federal government corporation — 'an agency performing wholly governmental services, and is an instrumentality of the United States.'"), *aff'd*, 909 F.2d 1484 (6th Cir. 1990); *PRI Pipe Supports v. TVA*, 494 F. Supp. 974, 975 (N.D. Miss. 1980) ("TVA is an agency performing wholly governmental services. . .").

In addition to *Johns*, *Bobo*, and *Mays*, there are a number of other decisions holding the discretionary function exception applicable to cases arising out of TVA's power program activities. *See Hill v. TVA*, 842 F. Supp. 1413, 1420 (N.D. Ala. 1993) (dismissing claims arising out of TVA's operation and management of Browns Ferry because "[w]hen TVA is engaged in a governmental function that is discretionary in nature, where the United States itself would not be liable, TVA cannot be subject to liability"); *Edwards v. TVA*, 255 F.3d 318, 320 (6th Cir. 2001) (holding that discretionary function exception applied to preclude liability for dangers "created by the discharge of water through . . . hydroelectric turbines" to generate electricity); *Queen v. TVA*, 689 F.2d 80, 84-85 (6th Cir. 1982) (holding that TVA's alleged defamation of an alleged electricity-saving device being marketed in the Tennessee Valley region involved a discretionary governmental function; the alleged motive of TVA was that widespread use of the device would reduce TVA's electric revenues).

Thus, a number of decisions of this Court and the Eleventh Circuit hold that the discretionary

function exception is applicable to TVA. For example, in holding TVA immune from allegations of promissory fraud, this Court stated in *North Alabama Electric Coop. v. TVA*, 862 F. Supp. 2d 1291, 1301 (N.D. Ala. 2012):

> Although TVA generally is subject to suit, "courts have held that TVA cannot be subject to liability when engaged in certain governmental functions." *Peoples National Bank of Huntsville, Alabama v. Meredith*, 812 F.2d 682, 685 (11th Cir. 1987) (citations omitted). That so-called "nonliability" doctrine applies to discretionary governmental functions. *Id.*

Likewise, in *Dickerson* v. *TVA*, No. CV94-B-1031-NW, Mem. Op. at 10 n.6 (N.D. Ala. Jan. 31, 1995), in holding the discretionary function exception applicable to preclude personal injury claims arising out of TVA's alleged negligent maintenance of the roadway over Wheeler Dam, the Court stated:

> The principle of nonliability for discretionary functions has been held to apply to tort suits filed against TVA, in the same manner as it applies to tort suits involving other government agencies by virtue of the discretionary function exception, 28 U.S.C. § 2680(a) (1988), to the Federal Tort Claims Act. *E.g., Peoples Nat'l Bank v. Meredith*, 812 F.2d 682, 684-85 (11th Cir. 1987);

Queen v. TVA, 689 F.2d 80, 86 (6th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983); *Morris v. TVA*, 345 F. Supp. 321 (N.D. Ala. 1972).

III. Plaintiffs Have Not Identified Any Mandatory Federal Statute, Regulation Or Policy Which Dictated a Specific Course of Action.

Plaintiffs do not contest that they have the burden of proving subject matter jurisdiction and that they must show that the challenged TVA conduct violated a mandatory Federal statute, regulation, or policy which dictated a specific course of action. Plaintiffs have not satisfied their burden for the simple reason that they have not identified any mandatory directive relating to TVA's alleged conduct.

Plaintiffs' suggestion that jurisdiction exists because the Complaint alleges that TVA breached a duty of care in the assembly and installation of the power lines across the Tennessee River (Doc. 17 at 21) is unavailing for the same reason; Plaintiffs have not identified any mandatory directive which dictated a specific course of action that TVA is alleged to have violated.

CONCLUSION

For the reasons stated and upon the authorities cited, the Court should dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(1).

Respectfully submitted,

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CERTIFICATE OF SERVICE

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